Supreme Court, U.S.
FILED
991009 DEC 13 1999
OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,
Petitioner,

v.

EUGENE TRANI, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 13, 1999

CORRECTED COPY

38 pp

QUESTIONS PRESENTED

I. In the face of a *Forbes v. Arkansas Educational Television Commission* challenge to the alleged viewpoint-motivated exclusion of a duly balloted political candidate from a government-run debate, did the lower courts err in denying discovery and summarily dismissing the well-plead complaint without requiring the defendants, as required by *Forbes*, to give reasons for the exclusion and providing the plaintiff the opportunity to prove that the exclusion was unreasonable and viewpoint-discriminatory?

II. Did the court of appeals err in holding a civil rights plaintiff and her *pro bono* counsel liable for prevailing party attorneys' fees under 42 U.S.C. § 1988 when the statute makes no reference as to who should pay the award and when the well-plead complaint presented *prima facie* claims for constitutional relief?

PARTIES

The individual petitioner in this case is Sue Harris DeBauche. The respondents are Dr. Eugene Trani (in his individual capacity and in his official capacity as President of Virginia Commonwealth University), L. Douglas Wilder (in his individual capacity), Clear Channel Radio, Inc., a Nevada corporation t/a WRVA-AM ("WRVA"), and Central Virginia Educational Telecommunications, Inc., a Virginia corporation t/a WNVT-TV ("WNVT").

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUE HARRIS DEBAUCHE respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit filed on September 15, 1999, affirming in part and reversing in part the judgment of the United States District Court for the Eastern District of Virginia in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A1 - A34)[1] is reported at 191 F.3d 499 (4th Cir. 1999). The opinion and order of the district court (A35 - A51) is reported at 7 F.Supp.2d 718 (E.D.Va. 1998). The opinion and order of the district court awarding attorneys fees and costs (A52 - A77) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment I, Freedom of Speech, Press and Association

Congress shall make no law. . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, Privileges and Immunities, Due Process, Equal Protection

No State shall make or enforce any law which shall abridge

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[1] All citations to the Appendix to this Petition are cited herein as "A" followed by the page number referencing the document cited.

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988, Proceedings in vindication of civil rights

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the

costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

28 U.S.C. § 1927, Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

The district court rushed to decide this case without the guidance of this Court's decision in *Arkansas Educational Television Commission v. Forbes*, 118 S.Ct. 1633 (1998) ("*Forbes*"). In *Forbes*, after a full trial on the merits, this Court found no intentional viewpoint discrimination in the exclusion of a political candidate from a debate sponsored by a government broadcaster. By contrast, in this case, after staying candidate Sue Harris DeBauche's legitimate discovery requests, the district court held no trial on her claim that she was unlawfully excluded from a state-run gubernatorial debate and, instead, summarily granted the defendants' motions to dismiss. The court never required the defendants to provide <u>any</u> reasons for excluding her from the debate, much less viewpoint-neutral reasons, and it refused to allow Ms. DeBauche the fair opportunity to prove that her exclusion was unreasonable and viewpoint-discriminatory.

This case is of particular significance in this election year because "candidate debates are of exceptional significance in the electoral process." Forbes, 118 S.Ct. at 1640. Unless the erroneous and restrictive decision below is reversed, the maxim that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content, or to favor one viewpoint over another, will in reality be mere rhetoric masking a closed two party political system. Under the crabbed reading of Forbes given by the panel majority, minority party candidates will be left wholly without a means to challenge improper exclusion from government funded and executed candidate debates. As Circuit Judge King stated in dissent:

> This is an important case that has come to a premature conclusion. State Colleges and Universities are places in which the infinite diversity of human thought should be celebrated. Such institutions ought not to be in the business of suppressing divergent viewpoints, a concept antithetical to the Constitution and to the cherished values upon which this nation was founded. We can only hope that, in this case, Sue Harris DeBauche was not silenced on account of her views as to how the Commonwealth of Virginia could best be governed. Unfortunately, as the result of the majority decision today, we may never know.

DeBauche v. Virginia Commonwealth University, 191 F.3d 499, (King, J., dissenting), A34.

The First Amended Complaint ("Complaint") alleged that Virginia Commonwealth University, an instrumentality of the Commonwealth of Virginia ("VCU"), and the other defendants purposefully discriminated against DeBauche by excluding her in 1997 from "Debate Virginia, the 1997 Virginia Gubernatorial Debate" ("Debate Virginia"), in violation of the First and

Fourteenth Amendments.[2] DeBauche was the duly balloted Virginia Reform Party candidate for Governor. Debate Virginia was the only *public* candidate debate in the 1997 Virginia gubernatorial race. The debate was co-sponsored, planned, promoted, managed and executed by VCU, and co-sponsors WNVT and WRVA, through the coordination of L. Douglas Wilder (a VCU Distinguished Professor and contract employee of WRVA), and Dr. Eugene Trani (the President of VCU) whose Executive Assistant served as Chairperson of the VCU Debate Coordinating Committee. Most if not all of the elaborate planning and production of Debate Virginia was coordinated and paid for by the defendant University which expended substantial public resources to propagate the viewpoints of the Republican and Democratic candidates for Governor to the exclusion of DeBauche's views and those of the Virginia Reform Party ("Party").[3]

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[2] In addition to 42 U.S.C. § 1983, jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

[3] "Planning for the debate was *spearheaded by VCU's Center for Public Policy and Wilder*, now a distinguished professor with the Center. . . . Administrators and staff members across the university, *including leadership from the Office of the President*, managed the daily execution of the event." See VCU University News Service News Release, A123-25 (emphasis added). VCU's involvement included written restrictions on speech used in the debate program, publishing the views and pictures of candidates Gilmore and Beyer on its Debate Virginia webpage, commercializing the debate with a theme and logo, providing infrastructure for a media blitz for the Debate, and expending substantial government funds. See Complaint ¶¶ 28, 29, 31; A89-92; see also A116, 118-20, 123-25, 130-32, 141-42, 144-53.

The Complaint specifically alleged that in 1997 each defendant and their agents were sophisticated political analysts who knew how modern political campaigns are run and who understood the central importance of promoting name recognition in the ultimate result of any election. Complaint ¶ 39-45a, 94-95; A93-94, A105-6. They also knew that since the campaign "was in a virtual dead heat" (Complaint ¶ 93, A105), the views of DeBauche could have radically changed the outcome of the campaign and the election. Based upon the historical performance figures of her Party, Ms. DeBauche could have affected up to 20% of the statewide vote and thus have cost either major party the Governorship. Complaint ¶ 39, 45, A94-95. Given the specific threat Ms. DeBauche posed, "VCU, Wilder and the private corporate defendants intentionally excluded Ms. DeBauche from Debate Virginia in order to promote the interests of the Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election." Complaint ¶ 98, A106. The Complaint also contended that "[b]ut for the actions of the defendants in gerrymandering the 1997 election results by marginalizing plaintiff and preventing her from raising her name recognition, she would have received at least 15% of the statewide vote in the election." Complaint ¶ 45a, A95.

The Complaint thus set forth a clearly stated claim of intentional discrimination by all of the defendants in the exclusion of Ms. DeBauche from Debate Virginia. See Complaint, ¶¶ 2, 9a, 9b, 45a, 51, 62-65, 68-69, 73, 79, 82-84, 87, 89, 91, 98-99; A80 et seq. It also plainly alleged that all of the defendants either individually or jointly would hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited. Complaint ¶¶62, 69, 82-84; A100-01, 103-04.

It is hard to imagine in these paragraphs a more pristine example of proper notice pleading of a claim of intentional First Amendment discrimination under the Federal Rules of Civil Procedure. But despite this pleading, both the district court and the panel majority found that no claim had been stated. After first staying discovery, and without waiting for this Court's decision in *Forbes* (which was then pending and followed only a few weeks later), the district court granted the defendants' motions to dismiss on April 13, 1998. A35-51.[4]

The district court ruled that defendants VCU and Trani were entitled to sovereign immunity and that Trani also was entitled to qualified immunity.[5] A42, 43-45. It further ruled that defendants Wilder, WRVA and WNVT were not "state actors" and therefore were not subject to suit for their actions. A45-48.

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[4] DeBauche was completely without notice that defendant Wilder had even filed a motion to dismiss. His motion was, in effect, decided ex parte, since it was never served on Ms. DeBauche or her counsel pursuant to Fed. R. Civ. P. Rule 5 and no hearing was ever held. Wilder's counsel misaddressed the service copy of the motion. After it was returned by the U. S. Postal Service, he failed to readdress or forward it to DeBauche's counsel's correct address until after the district court's decision and the notice of appeal had been filed. See A174-76. This extraordinary procedural gaffe did not inhibit the lower courts from awarding Wilder "prevailing party" attorneys fees and costs under 42 U.S.C. § 1988 against DeBauche even though she never knew of, or had an opportunity to rebut, the motion on which Wilder was a "prevailing party."

[5] DeBauche did not appeal the district court's ruling granting sovereign immunity to defendant VCU.

The court also held that defendant Wilder, WRVA and WNVT were entitled to an award of prevailing party attorneys' fees and costs against DeBauche under 42 U.S.C. § 1988, concluding that DeBauche's alleged and unrebutted claims were "without foundation" and were "baseless and unreasonable." A4-8 When it became clear that Ms. DeBauche did not have the resources to pay any measurable amount of attorneys' fees, defendants WRVA and WNVT then requested that attorneys' fees and costs be levied on petitioner's counsel and The Rutherford Institute under 28 U.S.C. § 1927. A52. The district court proceeded to award attorneys fees and costs in the amount of $48,477 jointly and severally against DeBauche (under 42 U.S.C. § 1988) and against her "counsel of record" (under 28 U.S.C. § 1927). A75-77. The Commonwealth of Virginia, representing defendants VCU and Trani, did not join in the request for attorneys fees or costs or for sanctions against Ms. DeBauche's attorneys in the district court.

The panel majority in the court of appeals sustained the judgment of the district court but reversed the award of attorneys fees and costs against DeBauche's "counsel of record" under 28 U.S.C. § 1927. A22-24. (It also denied a motion by WRVA and WNVT seeking sanctions under § 1927 for having the temerity even to pursue an appeal.) The court of appeals majority also sustained the district court's ruling that DeBauche was liable for prevailing party attorneys fees under 42 U.S.C. § 1988, but went on to hold that her *pro bono* attorneys also could be held liable for such fees under § 1988. A22. It reversed the monetary judgment levied by the district court and remanded for a new monetary determination in light of Ms. DeBauche's allegations of impecunity. Id. The panel majority also suggested that Rule 11 sanctions against counsel and The Rutherford Institute could be considered sua sponte by the district court as a potentially alternate means of disciplining

counsel. A24[6]

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED AND THIS CASE SUMMARILY REVERSED BECAUSE THE FOURTH CIRCUIT FUNDAMENTALLY ERRED IN UPHOLDING DISMISSAL OF THE CASE WITHOUT REQUIRING THE DEFENDANTS TO STATE THEIR REASONS FOR EXCLUDING CANDIDATE DEBAUCHE FROM DEBATE VIRGINIA AND WITHOUT ALLOWING HER THE OPPORTUNITY TO CONDUCT DISCOVERY AND PROVE UNLAWFUL VIEWPOINT DISCRIMINATION UNDER THE FREE SPEECH PRINCIPLES ANNOUNCED IN *FORBES V. ARKANSAS EDUCATIONAL TELEVISION COMMISSION*

A. The Courts Below Should Have Required A Statement of Reasons for the Exclusion of DeBauche from Debate Virginia

As the first appellate case since the decision in the *Forbes* case, this case specifically raised two questions which the Court

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[6] Ms. DeBauche does not appeal the Court of Appeals vacation of the district court's judgment against counsel of record under 28 U.S.C. § 1927. However, she vigorously contests any suggestion that the filing of this case was baseless or without foundation or that her counsel in filing the case violated Fed. R. Civ. P. Rule 11, particularly in light of the fact that this Court had not even decided the *Forbes* case when it was filed.

carefully noted did not appear in the record in that case --- "attempted manipulation of the political process" (118 S.Ct. at 1664), and unlawful viewpoint discrimination. *Id.* In *Forbes*, after *a full trial on the merits*, the jury explicitly found that the decision to exclude Forbes was based on reasonable grounds of journalistic discretion and not "political pressure" based on viewpoints. *Id.* at 1644.

Precisely the opposite situation is presented here. The district court summarily dismissed this case without any requirement that the defendants provide their reasons for excluding Ms. DeBauche, without any opportunity for discovery and without any chance for Ms. DeBauche to prove the facts. But Count III of the Complaint specifically alleged that programming decisions were, to use the words of *Forbes*, the result of "attempted manipulation of the political process" by politically astute defendants with vested interests in the major-party dominated political order. Moreover, while in *Forbes*, after discovery and trial, the jury found no viewpoint discrimination (id. at 1644), here Count II clearly made such a claim of viewpoint bias. On this foundation, in a civil rights case affecting core political speech and the basic integrity of democratic government, it was fundamental legal error for the district court to pretermit discovery and dismiss the Complaint.[7]

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[7] The courts below literally ignored Count III's allegations of "as applied" intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Washington v. Davis*, 426 U.S. 229 (1976); *Romer v. Evans*, 116 S.Ct. 1620, 1628 (1996). Inexplicably, the district court did not even properly describe the latter claim. See A37-38. But Count III plainly alleged that the defendants "*intentionally excluded* Ms. DeBauche from Debate Virginia in order to promote the interests of the

In addition to Ms. DeBauche's colorable allegations of intentional viewpoint discrimination, the defendants' complete stonewalling on their reasons for excluding Ms. DeBauche from Debate Virginia was per se arbitrary and unreasonable and by definition constituted viewpoint discrimination under First Amendment nonpublic forum principles. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985); *Forbes*, 118 S.Ct. at 1643-44. This Court noted in the *Forbes* case that the district court's initial dismissal of that case for failure to state a claim had been reversed by the Eighth Circuit, in part, because the broadcaster "had not given any reason for excluding him from the debate. . . ." *Forbes*, 118 S.Ct. at 1638. But here, the district court never required the defendants in any fashion to state their reasons for Ms. DeBauche's exclusion. Instead, it stayed all discovery and then summarily granted the defendants' motions to dismiss even though this Court was actually considering the *Forbes* case at the time. But *Forbes* requires that the exclusion of a candidate from a publicly-sponsored debate must be justified by "reasons." Here, the defendants gave no reasons, but simply stonewalled Ms. DeBauche and, indeed, upon her challenge in this case, continue to stonewall as to the reasons for her exclusion from the debate.

Certainly Ms. DeBauche's allegations of viewpoint and content discrimination, and the reasonable inferences necessarily drawn therefrom, more than satisfied the "notice pleading" requirements set forth in *Leatherman v. Tarrant County*, 507

Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election" Complaint ¶ 98, A106 (emphasis added). Additionally, the Court minimized the harm that was alleged, both in the past and in the future, to Ms. DeBauche and her Party. Complaint, ¶¶3, 6-6d, 42-45, 51-51a, 55, 59, 62-65, 69, 93-99; A81 et seq.

U.S. 163 (1993). Moreover, for purposes of a motion to dismiss under Rule 12(b)(6), her allegations should have been accepted as true and "construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hishon v. King & Spalding*, 467 U.S. 71, 73 (1984).

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, *all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests*. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to define more narrowly the disputed facts and issues.

Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). Instead of following this Court's admonition that notice pleading requirements "make no more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief" (*Leatherman*, 507 U.S. at 167-69), the lower courts imposed a "heightened" pleading requirement, construed all inferences against Ms. DeBauche and justified their rulings with findings of fact contrary to the allegations of the Complaint and the limited information obtained from subpoenas of the candidates.[8]

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[8] Both of the lower courts eschewed the need for any public forum analysis. Instead, the case was decided on an erroneous and improperly devised *factual* predicate, namely, that Dr. Trani simply granted Mr. Wilder "permission" to hold a private debate at VCU (which he did not) and that Debate Virginia was Mr. Wilder's private event (which it patently was not). Had the

In short, despite *bona fide* claims of unreasonable exclusion and purposeful viewpoint discrimination against Ms. DeBauche's freedom of speech under *Forbes*, the court of appeals majority gave short shrift to this Court's recognition that "candidate debates are of exceptional significance in the electoral process." *Forbes*, 118 S.Ct. at 1640. Instead, it sanctioned a significant departure by the district court from accepted judicial procedure and failed to apply properly this Court's precedents governing Rule 12(b)(6) motions, political candidate debates, state action and immunity. This Court should, therefore, exercise its supervisory powers and summarily reverse the decision below, requiring instead, as in *Forbes*, that the defendants come forth with their reasons for the exclusion of Ms. DeBauche and permit her to conduct discovery and prove her claims of arbitrary and unreasonable exclusion and viewpoint discrimination.

B. The Courts Below Should Have Allowed

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courts permitted development of the record and conducted a forum analysis, as required by *Forbes*, they would have found that this case was not simply viewpoint discrimination in a broadcast debate, but viewpoint discrimination on a publicly funded University Website and in a public University auditorium executed and coordinated by Trani and Wilder as employees of VCU. Debate Virginia consisted of at least three public fora, including the VCU Web Site (which actively and affirmatively promoted the views and pictures of the two major party candidates), the debate forum in the auditorium of the VCU Performing Arts Center on Monday, October 6, 1997 before a live audience and questioners, and the broadcast of the debate to a broad audience over co-sponsors, WNVT (a public television station) and WRVA (a commercial radio station).

Discovery on the Mixed Question of Law and Fact Relating to State Action

With reference to the private party defendants, the panel majority ignored this Court's governing precedents holding that state action involving alleged joint public-private activities is inherently a mixed question of law and fact. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). In the absence of a factual record clarifying fully the specific roles and interrelationships between and among the various defendants in this case, no legitimate state action determination could be made. That record was obviously not developed because discovery was stayed over the objections of Ms. DeBauche. This unfairly prevented her from obtaining all of the facts necessary in support of her claim of state action by each defendant.

The premature ruling below reflects the courts' mistaken and inappropriate fixation on former Governor Wilder's *initial* invitation to candidates Gilmore and Beyer to discuss the issues on Wilder's WRVA radio talk show program. However, what began as a private talk show discussion was later transformed through negotiations with VCU into the government-run and government-funded "Debate Virginia," co-sponsored, co-ordinated and executed by VCU and the private broadcasters with Wilder acting in multiple roles as VCU Distinguished Professor, employee of WRVA and political kingmaker.[9] In the meantime, Ms. DeBauche also had qualified as a duly balloted candidate and, like candidate Forbes in his Arkansas debate, subsequently requested inclusion in Debate Virginia. By then,

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[9] See Complaint, ¶¶33-37; A92-93; "Wilder Holds Election Wild Card," Richmond Times-Dispatch, October 6, 1997, A157-59.

the debate had changed dramatically for constitutional purposes. Rather than on a talk show, the debate would be held in a public forum, the VCU Performing Arts Center. The pictures and views of the candidates would be promoted on VCU's Website. VCU and its co-sponsors, under the coordination of Wilder and Trani, also would invent and promote the theme "Debate Virginia," create a commercial logo for the Debate, mobilize VCU staff and support personnel, issue press releases, set ground rules, prepare press packets and media feeds, provide security and parking and expend tax dollars to produce Debate Virginia. As a result of these significant changes, and the extensive involvement of VCU, WNVT and WRVA in the co-sponsorship and production of the debate (¶¶24a, 28, 55; A88-91, 98), the Complaint specifically alleged that Wilder, WNVT and WRVA were private persons who worked jointly with the state defendants, received significant aid and assistance from the state defendants, were jointly engaged with state officials in the challenged actions and with them were acting under color of law. ¶¶9a, 9b, 82-84; A84-85, 103-04.[10]

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[10] Under 42 U.S.C. § 1983, it is well-established that the joint involvement of private and public bodies in discriminatory action, even private action significantly encouraged by a public body, constitutes state action for purposes of the Fourteenth Amendment. *Adickes v. Kress*, 398 U.S. 144, 152 (1970). In this regard, the Complaint claimed that VCU unlawfully "delegated" its affirmative constitutional duty to promulgate regulations for access to public forums like Debate Virginia and vested standardless discretion in nongovernmental persons or entities to make unlawful distinctions based on viewpoint. Complaint ¶53, A97-98. It also alleged that the "actions of the defendants were authorized, sanctioned, implemented and ratified by officials functioning at a policy making level" and, that the constitutional deprivations are "fairly attributable" to

It is difficult to imagine, taken in the context of the other allegations in the Complaint, a more clearly stated and specific allegation of joint state action involving the state defendants and Wilder, WNVT and WRVA. Judge King pointed out the significance of these facts in his dissent:

> The majority asserts that Wilder, in his role as a radio personality and political figure, cannot be considered a state actor with regard to his involvement in Debate Virginia. The majority overlooks, however, that Wilder was also a contract employee of VCU. The materials submitted below reveal that Wilder was appointed in 1995 to the position of Distinguished Professor in VCU's Center for Public Policy. Indeed, the record contains no fewer than eight letters pertaining to Debate Virginia that were drafted by Wilder or his staff on VCU's letterhead. During DeBauche's ongoing efforts to be included in the debate, she and other members of the Virginia Reform Party attempted to telephone Wilder at his VCU offices. FAC at ¶¶46, 48.
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> ****
>
> Absent discovery, it is impossible to ascertain the extent to which Wilder acted on behalf of VCU with regard to the organization and administration of Debate Virginia. Insofar as Wilder was indeed attempting to further the interests of his university employer, he was plainly engaging in state action within the contemplation of §1983, and is therefore potentially liable to DeBauche. The question cannot, in any event, be resolved as a matter of law on a motion to dismiss.

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the state. See Complaint ¶¶80-81 A103.

(citations omitted) A31-33. Instead of properly interpreting this Court's precedents,[11] and without permitting development of the record, the court of appeals rejected the claim of state action as a matter of law, requiring a showing of *state coercion*, as opposed to *significant encouragement*, of the private participants as a precondition to state action, relying on *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 217 (4th Cir. 1993). The panel majority said:

> While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, *their conduct cannot be thought to have controlled his conduct* to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we apply *Andrews to these facts*, we conclude that none of the four circumstances that we identified in *Andrews* exists in this case.

A15-16 (emphasis added). Wholly apart from the error of judicial "fact finding" on a motion to dismiss (in blatant contravention of the principle that a plaintiff is entitled to every favorable inference from pleadings in the complaint), the panel majority, with its focus on the coersion test, failed to follow this Court's recent determination that state action may also be found in "significant encouragement, either overt or covert" of private actions. *American Manufacturers Mutual Insurance Co. v. Sullivan*, ____ U.S. ____, 119 S.Ct. 977, 986 (1999). In this

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[11] *American Manufactuers Mutual Insurance Co. v. Sullivan*, ____ U.S. ____, 119 S.Ct. 977, 986 (1999); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 925 (1981); *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980).

regard, the panel majority ignored entirely, as Judge King clearly protested in dissent, that Wilder was not simply an employee of WRVA, but a Distinguished Professor employed by VCU (and WRVA), a member of its Center for Public Policy which promoted the Debate, and he was, indeed, in a position to influence WRVA and WNVT, as well as the candidates and others. President Trani and Wilder were at the fulcrum of the co-sponsored public-private enterprise that produced Debate Virginia. And Wilder's refusal to return Ms. DeBauche's repeated requests by telephone calls to his office and his home, and VCU's failure to respond to telephone calls on its toll-free Debate Virginia hotline and e-mails to its website, linked all of the defendants to the deliberate stonewalling of Ms. DeBauche from Debate Virginia.[12]

For purposes of argument, even if the limited record in this case did not provide absolute legal certainty on the issue of state action, the allegations of the Complaint surely provided adequate notice of such a claim, and the district court erred in applying an incorrect standard of law and in deciding the state

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12 The panel majority also ruled under the *Andrews* case that Ms. DeBauche failed to allege that VCU sought to evade a clear constitutional duty by delegating it to a private party. Incredibly, the Court said that "there was no allegation of delegation" and there were no allegations to suggest VCU was using the private parties to evade that duty. A16. But paragraph 53 of the Complaint expressly alleged that "the state actor defendants have unlawfully breached and/or delegated their affirmative constitutional duty to promulgate constitutional regulations for access to, and expression in, designated public forums involving public service activities like Debate Virginia. . . by vesting standardless discretion in nongovernmental persons or entities action under color of state law. . . ." A97-98.

action question in the negative without providing Ms. DeBauche an adequate opportunity for discovery to prove it. As this Court made clear in the *Burton* case, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, 365 U.S. at 722. That inquiry was improperly short-circuited in the present case and should be remedied by remanding it to the district court with instructions for development of the record and findings in light of this Court's decision in *Forbes*.

C. The Courts Below Erred in Granting Dr. Trani Immunity for His Participation in Excluding Ms. DeBauche from Debate Virginia.

First, the court of appeals sustained Dr. Trani's assertion of qualified immunity despite the specific claim of as applied viewpoint discrimination by him. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It reasoned that the governing precedent was the *Forbes* case, which it noted was decided only "after Debate Virginia had taken place." A10. The court also noted that the Eleventh Circuit, in 1990, upheld the "content-based" decision of a Georgia public television station to include only the Republican and Democratic nominees, and to exclude a Libertarian Party nominee. *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 488-89 (11th Cir. 1990). A11.

The problem with this approach is that it ignores a longstanding line of cases expounding clearly established principles of law outlawing viewpoint discrimination in

university and school facilities.[13] As Judge King pointed out, "DeBauche's right to inclusion became clear more than five years prior to the *Chandler* case, with the Supreme Court's decision in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)" and its predecessor, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). A28. Pointing out that this case involved a public official and state action denying access to a forum, Judge King observed that:

> Even in the case of a nonpublic forum. . . it is abundantly clear that a speaker may not be excluded on the basis of her viewpoint. As Justice O'Connor stated in *Cornelius*, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 806. Moreover, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Id.* at 811 (citations omitted).

A28-29. In this context, Dr. Trani was most certainly on notice of the longstanding principles outlawing viewpoint discrimination in public forums, as expressed long ago in *Cornelius* and *Perry*, and also clearly sustained in cases involving *university* and school facilities in *Rosenberger v. Rector and Visitors of University of Virginia*, 505 U.S. 816 (1995), *Lamb's Chapel v. Center Moriches Union School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981). The *Forbes* decision did not alter, but simply continued, these longstanding and well-settled principles. See

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[13] It also ignores the claim of "as applied" intentional discrimination in an election case. *See* note 7, *supra.*

also *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (exclusion of speaker from school board meeting); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975) (exclusion of musical "Hair" from municipal auditorium). Moreover, even if the debate were totally private, Dr. Trani certainly could not indiscriminately authorize *government funding* for selected political candidates that was improperly motivated by unlawful viewpoint discrimination. See *National Endowment for the Arts v. Finley*, 118 S.Ct. 2168, 2178-79 (1998).

Second, in similar fashion, to avoid deciding the merits of the well-plead claims, the panel majority also misinterpreted the Eleventh Amendment and the *Ex parte Young*, 209 U.S. 123 (1908), doctrine to accord Dr. Trani sovereign immunity so that no injunctive relief could run to him. But none of this Court's recent elaborations upon the Eleventh Amendment required this result. Compare *College Savings Bank v. Florida Prepaid Post-Secondary Educ. Expense Bd.*, ___ U.S. ___, 119 S.Ct. 2219 (1999) and *Alden v. Main*, ___ U.S. ___, 119 S.Ct. 2240 (1999). In apparent agreement that this dispute was capable of repetition and not moot, the panel approvingly referred to the district court's finding that it was more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a future debate including only Democratic and Republican candidates and involving a State University. A7. But instead of keeping Dr. Trani in the case to preserve remedies for prospective relief such as proscribing further expenditures of public funds to promote the views of selected candidates, the court of appeals prematurely determined on an inadequate record that the Eleventh Amendment, as a matter of law, did not permit injunctive relief despite an allegation of an ongoing violation of federally-protected rights. Complaint, ¶¶62, 69, 84; A100-01, 103-04. But under the circumstances of this

case, any proper determination of sovereign immunity could not be made without an adequately developed record. Moreover, even if injunctive relief were not available, this case still presented an appropriate occasion for declaratory relief that is permitted against state officials under principles announced in *Steffel v. Thompson*, 415 U.S. 452 (1974), and *Green v. Mansour*, 474 U.S. 64 (1985), and for which there is no bar of sovereign immunity.

II. THE WRIT SHOULD BE GRANTED BECAUSE IT WAS WHOLLY IMPROPER TO HOLD A CIVIL RIGHTS PLAINTIFF AND HER *PRO BONO* COUNSEL LIABLE FOR PREVAILING PARTY ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 IN THE ABSENCE OF EXPLICIT STATUTORY AUTHORITY OR A JUSTIFYING PRECEDENT IN THIS COURT AND WHEN THE WELL PLEADED COMPLAINT PRESENTED *PRIMA FACIE* CLAIMS FOR CONSTITUTIONAL RELIEF

The lower courts' failure to permit development of the record, and their mistaken and entirely premature factual assumptions about the involvement of the parties, led inexorably to the erroneous conclusion that DeBauche's claims were unreasonable and without foundation, meriting an award of attorneys fees under 42 U.S.C. § 1988. As if it were not enough that a candidate who was fearless enough to bring this action should be penalized, the court of appeals magnified its error by holding, in the absence of any precedent in this Court, that an award of attorneys under § 1988 could likewise be levied on Ms. DeBauche's pro bono civil rights counsel provided

by The Rutherford Institute.[14]

Not only does this decision by the Fourth Circuit directly conflict with the holding of the Third Circuit in *Brown v. Borough of Chambersburg*, 903 F.2d 274, 276-77 (3rd Cir. 1990), if upheld, it casts a considerable pall upon public interest litigation. Without any clear statutory authority in 42 U.S.C. § 1988 or precedent in this Court, the ruling presents an important unresolved question of Federal law, as confirmed by this Court's recent grant of *certiorari* on November 29, 1999, to consider whether "prevailing party" attorneys fees may be assessed against a non-party under 35 U.S.C. § 285. *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), cert. granted, ____ U. S. ____ (U.S. November 29, 1999)(No. 99-502).[15] As with the latter statute, the language of § 1988 makes no reference as to who may be required to pay

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[14] In its discussion of the lower court's award of attorneys fees and costs under 42 U.S.C. § 1988, the court of appeals majority held that "*If the [district] court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.*" A22 (emphasis added). The panel provided no textual analysis or case law rationale justifying its *ipse dixit* holding under § 1988.

[15] This Court *in dictum* has expressed conflicting thoughts on the reach of § 1988, but it has never authorized an award of §1988 attorneys against counsel to a party, whether counsel to a plaintiff or to a defendant. Compare *Roadway Express v. Piper*, 447 U.S. 752, 761, n.9 (1980)("Neither 1988 nor 2000e-5(k) makes any mention of attorney liability for costs and fees") with *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) ("Section 1988 does not in so many words define the parties who must bear these costs").

"prevailing party" attorneys fees. Given the decision below, the conflict it presents in the Circuits, and this Court's pending consideration of the *Nelson* case, this important and recurring question of Federal law should be resolved.

The jurisprudential damage inflicted by the majority's decision is readily apparent. Civil rights plaintiffs and pro bono counsel now will have to contemplate the prospect of routinely fending off motions for attorneys fees in election debate cases going to the heart of basic fairness in the democratic process. Moreover, the decision interferes with the remedial purposes of the civil rights laws which limit fee awards against plaintiffs, in part, because "decisive facts may not emerge until discovery or trial" and the "law may change or clarify in the midst of litigation." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). But the panel majority's crabbed reading of *Forbes* and its utter disregard of principles of fairness and openness in election matters sends a wholly contrary and inappropriate message to other minority party candidates: If you seek adjudication of your civil rights, without a "smoking gun" you and your counsel will be punished.

Finally, the defendants' attempts in the district court to impose fees on The Rutherford Institute, and the court of appeals' subsequent holding that § 1988 fees could be awarded against Ms. DeBauche's pro bono counsel (as amplified by the court of appeals repeated recitals of the district court's "concerns [about] how this case was funded" and Ms. DeBauche's "financial resources," A8, 19, and 22), raise serious issues under the Petition, Speech and Association Clauses of the First Amendment for the particular advocacy organization supporting this case and its affiliate counsel. See *NAACP v. Button*, 371 U.S. 415, 428-29 (1983), *In Re Primus*, 436 U.S.

412, 423 (1978), and their progeny.[16] But this ill-advised, after-the-fact, and indeed, illegal attempt to punish the purveyor of the message does not survive scrutiny under the Petition, Speech and Association Clauses or § 1988 case law.

At the time it was brought, and now, Ms. DeBauche's claims were, and are, reasonably grounded in law and fact. This Court had not even decided *Forbes* at the time this action was initiated and the Eighth Circuit had held that candidates possessed a "presumptive right of access" to appear in debates sponsored by government broadcasters. *Forbes v. Arkansas Ed. Television Corp.*, 93 F.3d 497, 504 (8th Cir. 1996). Moreover, the Complaint stated a valid cause of action, factually and legally, in light of the unique fora involved in this case, the joint sponsorship of the public and private defendants and the pendency of the *Forbes* case. Even the *Forbes* majority discussed application of First Amendment viewpoint discrimination claims to both "public and *private* broadcasters" (see 118 S.Ct. at 1639-40, discussion under headnote 2, emphasis added). In this case, as Judge King noted, the private broadcasters were linked for purposes of state action requirements by Mr. Wilder's employment with VCU and his "professional association with WRVA." A33. The failure of the panel majority to recognize these facts, together with the award of prevailing party attorneys fees against Ms. DeBauche's counsel and the conflict this decision poses among the circuits, mandates plenary consideration by this Court on this important

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[16] The panel majority indicated the lower court could consider "[Ms. DeBauche's] resources or her backing for this lawsuit." A22. Ms. DeBauche's counsel are cooperating attorneys for The Rutherford Institute which provided pro bono counsel who represented Mr. Forbes before the U. S. Supreme Court in that case.

issue of Federal law.

CONCLUSION

If *Forbes* stands for anything, it is the proposition that government cannot put its hand on the scale to gerrymander or skew the political process. When government controls and commits substantial resources to promote the viewpoints of some duly balloted candidates, it also must at least provide a reasonable justification for the exclusion of other duly balloted candidates from any debate it chooses to fund or sponsor. But no justification at all was provided in this case. And no opportunity was given to Ms. DeBauche to conduct discovery or prove her case.

For the reasons set forth above, this Court should act in the exercise of its supervisory jurisdiction over the Federal courts and summarily reverse and remand the case to the district court (a) to conduct discovery and trial in light of this Court's decision in *Forbes*, (b) to require each defendant to state the reasons for the exclusion of Ms. DeBauche, and (c) to decide, after discovery and proper development of the record, the mixed questions of law and fact relating to state action and governmental immunity.

In the alternative, this Court should undertake plenary consideration of the important issues of Federal law presented by this case, including the extraordinary and unprecedented ruling of the court of appeals that prevailing party attorneys fees may be awarded against plaintiff's counsel under 42 U.S.C. § 1988.

DATED: December 13, 1999.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 99-

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,

Petitioner,

v.

EUGENE TRANI, et al.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX
Volume I of II

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APPENDIX TO PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Civil Action No. 98-1658

SUE HARRIS DEBAUCHE,
Plaintiff-Appellant,

v.

EUGENE TRANI; LAWRENCE DOUGLAS WILDER; CLEAR CHANNEL RADIO, INCORPORATED, t/a WRVA, a Nevada Corporation; CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS CORPORATION, t/a WNVT,
Defendants-Appellees,

and

VIRGINIA COMMONWEALTH UNIVERSITY,
Defendant.

ACLU FOUNDATION OF VIRGINIA,
Amicus Curiae.

Civil Action No. 98-2517

SUE HARRIS DEBAUCHE,
Plaintiff-Appellant,

A2

v.

LAWRENCE DOUGLAS WILDER; CLEAR CHANNEL RADIO, INCORPORATED, t/a WRVA, a Nevada Corporation;

CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS CORPORATION, t/a WNVT,
Defendants-Appellees,

and

VIRGINIA COMMONWEALTH UNIVERSITY; EUGENE TRANI,
Defendants.

ACLU FOUNDATION OF VIRGINIA,
Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond
James R. Spencer, District Judge.
(CA-97-770-3)

Argued: March 3, 1999

Decided: September 15, 1999

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge

Widener joined. Judge King wrote a separate opinion, concurring in part and dissenting in part.

COUNSEL

ARGUED: James Jeffrey Knicely, KNICELY & COTORCEANU, P.C., Williamsburg, Virginia, for Appellant. Alison Paige Landry, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; John Samuel Martin, HUNTON & WILLIAMS, Richmond, Virginia; Andrew Gray Mauck, MAYS & VALENTINE, L.L.P., Richmond, Virginia; Lawrence Douglas Wilder, Jr., WILDER & GREGORY, Richmond, Virginia, for Appellees.

ON BRIEF: Thomas Stephen Neuberger, THOMAS S. NEUBERGER, P.A., Wilmington, Delaware; John W. Whitehead, Stephen H. Aden, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia, for Appellant. Mark L. Earley, Attorney General of Virginia, Ashley L. Taylor, Jr., Deputy Attorney General, Ronald C. Forehand, Senior Assistant Attorney General, William E. Thro, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant Trani. R. Hewitt Pate, HUNTON & WILLIAMS, Richmond, Virginia; Robert L. Brooke, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellees WNVT and WRVA. Roger L. Gregory, Laura M. Hillenbrand, WILDER & GREGORY, Richmond, Virginia, for Appellee Wilder. Randal M. Shaheen, Christopher F. Winters, ARNOLD & PORTER, Washington, D.C., for Amicus Curiae.

OPINION

NIEMEYER, Circuit Judge:

During the 1997 gubernatorial election campaign in Virginia, L. Douglas Wilder, a radio talk show host with radio station WRVA and former governor of Virginia, organized a political debate between the Republican and Democratic candidates for governor at Virginia Commonwealth University ("VCU"). The debate, dubbed "Debate Virginia," was broadcast on radio station WRVA and on television station WNVT, as well as on other stations. Because she was not invited to participate, Sue Harris DeBauche, the Virginia Reform Party candidate for governor, filed this action under 42 U.S.C. § 1983, alleging that the defendants violated her constitutional rights to free speech and equal protection.

The district court dismissed DeBauche's action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on various grounds as applicable to the several defendants, including sovereign immunity, qualified immunity, and the absence of "state action." The court also assessed a portion of defendants' attorneys fees and costs against both DeBauche and her attorneys based on the action's lack of merit.

For the reasons that follow, we affirm the district court's dismissal order but vacate the order shifting fees and costs for reconsideration in light of this opinion.

I

On October 15, 1997, a few weeks before the 1997 gubernatorial election in Virginia, DeBauche filed the complaint in this case under 42 U.S.C. § 1983, alleging that she had been

excluded from Debate Virginia in violation of her rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution. She named as defendants: VCU, where the debate had occurred; its president, Eugene Trani, both individually and in his official capacity; and Douglas Wilder, who initiated the debate by inviting the Republican and Democratic candidates to a radio debate. DeBauche requested a declaratory judgment that her rights had been violated, injunctive relief, and compensatory and punitive damages in an unspecified amount. After VCU and Trani filed a motion to dismiss, DeBauche filed an amended complaint to modify some of the allegations and to add as defendants the owners of the radio station and the television station which sponsored the debate: Clear Channel Radio, Inc., the owner of radio station WRVA ("WRVA"), and Central Virginia Educational Telecommunications, Inc., the owner of television station WNVT ("WNVT").

In her amended complaint, DeBauche alleged that in April 1997, Wilder invited Republican gubernatorial nominee, James S. Gilmore, III, and Democratic nominee, Donald S. Beyer, Jr., to a radio debate in which each could address the issues of the campaign and his record. Several months later, in July 1997, Wilder confirmed in writing "that negotiations were concluded relative to Debate Virginia" and that it would be "jointly sponsored" by WRVA, WNVT, and VCU. The amended complaint alleges that VCU and Trani offered, and Wilder accepted, VCU as a place to hold the debate and that VCU and Trani contributed "VCU personnel, staff and other resources to plan, promote, manage and execute the debate." As DeBauche characterized the roles of the parties, Wilder "served as convener and moderator of Debate Virginia," and all of the other defendants "co-sponsored, planned, promoted, managed, executed, and paid" for it. The debate took place on October 6,

1997.

After arrangements for the debate had been completed and three weeks before the debate, DeBauche became "duly qualified" with the State Board of Elections as the Reform Party candidate for governor, having been selected at a meeting of the Virginia Reform Party State Central Committee on September 14, 1997. Between September 15 and October 6, DeBauche alleged that she and other Reform Party members placed telephone calls to Wilder at various telephone numbers and to Debate Virginia at its toll-free number for the purpose of having DeBauche included in the debate. DeBauche also sent e-mails to Debate Virginia's website for the same purpose. DeBauche alleged that she received no responses to her inquiries and that all efforts to participate were unsuccessful. Shortly after the debate, DeBauche "made a written demand to the defendants VCU and Trani that they schedule a gubernatorial debate including all three candidates before the November 4, 1997, election," but VCU and Trani rejected this demand on October 24, 1997.

DeBauche alleged that Debate Virginia constituted a designated public forum at which she was entitled under the First Amendment to appear and to express her views and the views of the Reform Party. To that end, she purported to bring the action not only on her own behalf but also on behalf of "the individual members of [the Virginia Reform Party] and on behalf of the Party." Alternatively, she alleged that even if the debate was a nonpublic forum, she and the Reform Party members were discriminated against "without a reasonable basis." Specifically, she claimed that "[b]ut for the actions of the defendants" in not including her in Debate Virginia, she would have received "at least 15% of the statewide vote in the [1997] election."

In an attempt to satisfy the requirements of 42 U.S.C. § 1983, DeBauche alleged that VCU and Trani were "state actors" and that Wilder, WRVA, and WNVT "may fairly be said to be state actors because they worked jointly on Debate Virginia with the defendants VCU and Trani." She alleged that because Wilder, WRVA, and WNVT "have jointly engaged with state officials in the challenged actions, . . . they [were] acting under color of law."

DeBauche requested relief including: (1) a declaratory judgment that the defendants' actions deprived DeBauche, the Party, and the Party's members of constitutional rights, (2) an injunction barring the defendants from excluding DeBauche and "any other future Party candidate" from any future debate, (3) compensatory and punitive damages, and (4) attorneys fees. In addition, DeBauche asked the court to "review and consider" the results of the 1997 gubernatorial election to determine whether other equitable relief was warranted, including "declaring that [DeBauche] would have received 15% of the statewide vote" and directing that the State Board of Elections be joined "to certify [Virginia Reform Party] candidates . . . to be placed on the ballot in the next Virginia gubernatorial election."

The district court granted the defendants' motions to dismiss the amended complaint on April 13, 1998, on various grounds. At the outset, the court rejected the defendants' contention that DeBauche's claims were moot because "[i]t is more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a [future] debate including only Democratic and Republican candidates and involving a state university." The court concluded, however, that DeBauche lacked standing to assert claims on behalf of the Reform Party. With respect to the claims against the state actors, VCU and

Trani, the district court found that the claims were barred by the Eleventh Amendment. With respect to the claims against Trani in his individual capacity, the court found that DeBauche failed to allege sufficient state action and that Trani was entitled to qualified immunity. And finally, with respect to the private defendants, Wilder, WRVA, and WNVT, the court found that they were not state actors and that they were not sufficiently intertwined with state actors to make their conduct state action.

In a subsequent order, the district court also awarded defendants Wilder, WRVA, and WNVT attorneys fees and costs under 42 U.S.C. § 1988(b), in the amount of $48,477, concluding that DeBauche's claims against them were "without foundation" and "baseless and unreasonable." The court also ordered that DeBauche's counsel be jointly and severally liable under 28 U.S.C. § 1927, in the amount of $37,859, for the awards made to WRVA and WNVT. The court inferred bad faith on the part of DeBauche's attorneys because "it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action." The court observed that the liability for DeBauche's attorneys was particularly appropriate "in light of DeBauche's [impecunious] financial situation and the Court's question as to how her lawsuit has been funded."

This appeal followed.

II

The district court dismissed the claims against VCU and against Trani in his official capacity as president of VCU on the basis that they were barred by the Eleventh Amendment. DeBauche

does not challenge the district court's decision as to VCU, but she does contend that Trani does not have Eleventh Amendment immunity from her claims for injunctive and declaratory relief because "official- capacity actions for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (citing Ex parte Young, 209 U.S. 123 (1908)). The Ex parte Young exception, however, applies only when there is an ongoing violation of federal law that can be cured by prospective relief. It does not apply when the alleged violation of federal law occurred entirely in the past. See Green v. Mansour, 474 U.S. 64, 68 (1985) (observing that "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment"); Republic of Paraguay v. Allen, 134 F.3d 622, 627 (4th Cir. 1998) (noting that the Ex parte Young exception applies only when "(1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective" (citations omitted)).

In her amended complaint, DeBauche alleged that Trani conspired to keep her out of Debate Virginia in 1997 and that the defendants, including Trani, "will either individually or jointly sponsor, plan, promote, manage or hold statewide debates in the future from which candidates of the [Virginia Reform] Party will be excluded and to which only Democratic and Republican candidates will be invited." While we must, at this motion-to-dismiss stage of the case, accept as true the allegations of DeBauche's complaint, see Conley v. Gibson, 355 U.S. 41, 47-48 (1957), her allegations that she or Reform Party candidates will be excluded from future debates do not, as a matter of law, allege an ongoing violation of federally-protected rights. Instead, they amount to conjecture regarding discrete future events. Mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing violation. Accordingly, DeBauche's claim against Trani

in his official capacity does not fall within the Ex parte Young exception, and we have no reason not to apply the traditional principles of Eleventh Amendment immunity to dismiss the claims against Trani in his official capacity.

III

To the extent that DeBauche alleges that Trani, in his individual capacity, violated her constitutional rights, Trani is entitled to qualified immunity if his conduct involved performance of discretionary duties and did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Buõnocore v. Harris, 65 F.3d 347, 353 (4th Cir. 1995).

The constitutional violation alleged in this case arose from DeBauche's contention that she was excluded from Debate Virginia based upon the "content or viewpoint" expressed by her candidacy. Assuming solely for purposes of this argument that VCU and Trani, by providing the location for the debate, were in fact responsible for the selection of the participants and that the exclusion of DeBauche was viewpoint-based, Trani would nonetheless be entitled to qualified immunity because he could not have known at the time that such conduct was constitutionally prohibited. The question raised under these assumptions would be whether a candidate debate held by a state entity was a "public forum" such that viewpoint discrimination would be restricted by the Constitution.

This issue was decided for the first time in Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998), after Debate Virginia had taken place. In Forbes, which held that a decision to exclude a minor party candidate from a

debate sponsored by a public television station was subject to First Amendment review in a nonpublic forum category, the Court noted that it was carving out, for the first time, a "narrow exception to the rule" that public broadcasters' programming is generally not subject to scrutiny under the public forum doctrine. Id. at 675. Prior to Forbes, there was no clearly established constitutional prohibition on making content-based or viewpoint-based decisions on whom to include in publicly sponsored debates. Indeed, even under Forbes, a government-sponsored debate can exclude candidates as long as the exclusion is a"reasonable, viewpoint-neutral exercise of journalistic discretion." Id. at 683. And prior to Forbes, the Eleventh Circuit, in 1990, had upheld the decision of a Georgia public television station to include only the Republican and Democratic nominees, and to exclude the Libertarian Party nominees, in debates it was sponsoring, even though the court found that that decision was "content-based." Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990).

Because it was not clearly established in the fall of 1997 that the First Amendment restricted content-based or viewpoint-based decisions to exclude candidates from publicly sponsored debates, the district court correctly afforded Trani qualified immunity.

IV

The district court dismissed the private parties -- Wilder, WRVA, and WNVT -- because a claim under 42 U.S.C. § 1983 requires that the defendant be fairly said to be a state actor and DeBauche failed to allege facts that would have permitted the court to conclude that these defendants were state actors. We agree with the district court's conclusion.

DeBauche's complaint, which is based on 42 U.S.C.§ 1983, alleges that all of the defendants denied her federal constitutional rights under color of law because VCU and Trani were state actors and Wilder, WRVA, and WNVT were de facto state actors. She acknowledges that in April 1997, before VCU and Trani were involved, Wilder initiated the debate by inviting the Republican and Democratic gubernatorial candidates to a radio debate, but she contends that Wilder's later cooperation with VCU and Trani, who were concededly state actors, made his conduct state action. As she maintains, "VCU contributed substantial, extraordinary funding and other institutional resources to affect all aspects of Debate Virginia." As to the broadcasting companies, she states that "WNVT and WRVA engaged in unconstitutional political manipulation and viewpoint discrimination together with VCU and defendants Trani and Wilder . . . all in furtherance of a mutually beneficial state-sponsored and funded enterprise." From these allegations, she argues that the joint involvement of private and public bodies in discriminatory action, "even private action backed-up or endorsed by a public body, constitutes state action for purposes of the Fourteenth Amendment."

To implicate 42 U.S.C. § 1983, conduct must be"fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (observing that § 1983's "under color" of law requirement is equivalent to the "state action" requirement of the Fourteenth Amendment (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966))). The person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's

scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints"); Lugar, 457 U.S. at 941 (noting that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a `state actor' for purposes of the Fourteenth Amendment"); Adickes v. S. H. Kress & Co., 398 U.S. 144, 170-71 (1970) (holding that a private party that engaged in racial discrimination as part of a state-enforced custom would be a state actor for purposes of 42 U.S.C. § 1983). Thus, the Supreme Court has held that private activity will generally not be deemed "state action" unless the state has so dominated such activity as to convert it into state action: "Mere approval of or acquiescence in the initiatives of a private party" is insufficient. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). Stated differently, to become state action, private action must have a "sufficiently close nexus" with the state that the private action "`may be fairly treated as that of the State itself.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S. Ct. 977, 986 (1999) (quoting Blum, 457 U.S. at 1004). And the establishment of the close nexus "depends on whether the State `has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.'" Id.

DeBauche maintains that the joint participation of public and private actors in organizing and conducting Debate Virginia transformed the private actors' conduct into "state action," relying principally on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (defining a "joint participation" test for finding state action). But DeBauche's argument does not account for the actual holding in Burton nor the Supreme Court's later refinements which explain what is required to

convert private action into state action. In Burton, a government agency leased space in a public parking garage to a restaurant that discriminated against blacks. The Court identified a symbiotic relationship in which "profits earned by discrimination not only contribute[d] to, but also [were] indispensable elements in, the financial success of a governmental agency." Id. at 724 (emphasis added). In the "peculiar facts [and] circumstances present" in Burton, id. at 726, the Supreme Court concluded that"[t]he State ha[d] so far insinuated itself into a position of interdependence" with the restaurant that the joint participation of public and private actors made the private party's conduct state action restricted by the Fourteenth Amendment. Id. at 725. That holding, however, certainly does not stand for the proposition that all public and private joint activity subjects the private actors to the requirements of the Fourteenth Amendment. See Blum, 457 U.S. at 1011; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); see also Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (noting that Burton's holding was "quite narrow" and questioning its continuing viability). In its more recent discussion of the subject, the Supreme Court articulates the numerous limits to the joint participation test, noting that "Burton was one of our early cases dealing with `state action' . . . and later cases have refined the vague `joint participation' test embodied in that case." Sullivan, 119 S. Ct. at 988. Applying the principles elucidated and refined by the Supreme Court, we have recognized four exclusive circumstances under which a private party can be deemed to be a state actor:

> (1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private

> actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993). "If the conduct does not fall into one of these four categories, then the private conduct is not an action of the state." Id.

The facts alleged in DeBauche's amended complaint show that Wilder, a radio talk show host, first invited the Republican and Democratic candidates for governor to debate campaign issues on his radio talk show. When VCU offered to provide a place for the debate on its campus, Wilder accepted, so that, as finally arranged, Wilder "convened and moderated" the debate, which took place at VCU's campus and which was broadcast on radio and television by WRVA, WNVT, and other stations. The complaint alleged that all of the defendants "co-sponsored, planned, promoted, managed, executed and paid for" the debate.

However these facts are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action. As distinguished from Burton, DeBauche's amended complaint does not describe facts that suggest interdependence such that VCU relied on the private defendants for its continued viability. While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, their conduct cannot be thought to have controlled his conduct to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we

apply Andrews to these facts, we conclude that none of the four circumstances that we identified in Andrews exists in this case.

First, DeBauche has not alleged that VCU or any other arm of the state coerced any of the private defendants into committing an act that the state could not constitutionally undertake. The alleged unconstitutional act -- the failure to invite DeBauche to participate in the debate – resulted, according to DeBauche's amended complaint, from the initial, independent decision by Wilder to invite only Gilmore and Beyer to the debate. There is no suggestion that Wilder's decision to invite only them, or the stations' decision to broadcast the debate, was the result of coercion by VCU or Trani. In fact, the complaint states that the three private party defendants were "willful participants" in the organization of the debate.

The second Andrews circumstance is also not present in this case. DeBauche does not allege that VCU or any other state actor sought to evade a clear constitutional duty by delegating responsibility to a private party. First, there was no allegation of delegation. According to the complaint, Wilder decided on his own to host a debate and VCU offered, months later, to provide a site on its campus. VCU agreed to assist Wilder with his project, but there is no allegation that VCU delegated any of its governmental responsibilities to him or to the broadcast stations. Second, there are no allegations that suggest that VCU was using the private parties to evade a "clear constitutional duty." Indeed, nothing that was done regarding Debate Virginia violated any constitutional right that was clearly established at the time the debate was organized. See Part III, supra.

The third Andrews circumstance -- when "the state has delegated a traditionally and exclusively public function to a private actor" -- is present only when the function at issue is

"traditionally the exclusive prerogative of the State." United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 906 (4th Cir. 1995) (internal quotation marks and citations omitted) (holding that a private entity which organized a public festival held on public streets and sidewalks and supported in part with public money was not engaged in state action). This category is very narrow. See id. at 907. For example, the operation of a town has been held to be a function that is traditionally the exclusive prerogative of government. See Marsh v. Alabama, 326 U.S. 501 (1946). The hosting of political debates, conversely, is not within the exclusive prerogative of the government. While public broadcasters and state universities often sponsor such debates, so do private broadcasters and private universities. Indeed, hosting debates could never be the exclusive prerogative of the government because the First Amendment protects private parties' rights to put on (and select the content of) debates. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569-70 (1995) (holding that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices"); Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994).

Finally, the fourth Andrews circumstance is completely irrelevant as DeBauche does not allege that VCU or any other arm of the state enforced any right of any of the private party defendants.

Because the allegations of DeBauche's amended complaint make it quite clear that the actions attributable to Wilder, WRVA, and WNVT amounted to their independently-motivated, private actions, rather than "state action," DeBauche fails to state a claim under 42 U.S.C. § 1983 against the private defendants for which relief can be granted.

See Fed. R. Civ. P. 12(b)(6).

V

Finally, DeBauche challenges the district court's order awarding attorneys fees and costs to Wilder, WRVA, and WNVT under 42 U.S.C. § 1988(b)[1] and holding her attorneys jointly and severally responsible for the fees and costs awarded to WRVA and WNVT under 28 U.S.C. § 1927.[2]

The district court found that DeBauche's attempt"to make [Wilder] a state actor because VCU only helped execute the debate was baseless and unreasonable." Similarly, the court concluded that DeBauche's suit against WRVA and WNVT was "without foundation."

These two broadcasters "were not even alleged to have played a role in the decision to exclude [DeBauche] from the debate." For these reasons, the court exercised the discretion

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1. Section 1988(b) provides in relevant part:

In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost

2. Section 1927 provides in relevant part:

Any attorney or other person admitted to conduct cases in any court . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

conferred by 42 U.S.C. § 1988(b) to award Wilder $10,618.20 in fees and costs; WRVA, $13,922.80; and WNVT, $23,935.70.

In addition to the award under § 1988, the court held DeBauche's attorneys jointly and severally liable for the awards made in favor of the two broadcast stations under 28 U.S.C. § 1927. The court noted that

> it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action. It was clear from the beginning that Wilder alone made the decision to exclude her from Debate Virginia and that the private defendants and the University were not in some collaboration about that Wilder decision.

The court concluded that DeBauche's attorneys' actions against the broadcast stations were "an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927, particularly in light of DeBauche's financial situation and the Court's question as to how her lawsuit has been funded."

DeBauche contends that the private defendants did not make "the necessary evidentiary showing" to justify an award under § 1988. In addition, she maintains that the § 1988 award was improper because the court did not consider her inadequate financial means to pay such an award. She provided the court with her income tax returns for the three years preceding the award, showing that in 1995 her adjusted gross income was $17,639; in 1996, $15,146; and in 1997, $8,982. As to the § 1927 award, DeBauche argues that the statutory requirements

that the proceedings be multiplied unreasonably and vexatiously could not be met as a matter of law because the conduct upon which the award was based was the mere filing of an amended complaint. We address these points in order.

A.

Section 1988(b) confers discretion on courts to award attorneys fees to the prevailing party in an action brought under, inter alia, 42 U.S.C. § 1983. When the prevailing party is the defendant, the attorneys fees should be awarded if the court finds "`that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'" Hughes v. Rowe, 449 U.S. 5, 14 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). Stated otherwise, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation," but there need not be any subjective bad faith on the part of the plaintiff. Id.

While we might be persuaded that the record does not show that DeBauche brought her action in bad faith, we cannot agree that the district court abused its discretion in finding her claim to be "groundless or without foundation." Both the Supreme Court and our court have been very clear about two relevant points of law: (1) the constitutional protections of free speech and equal protection apply only against governmental action, and not against private action, see Edmonson, 500 U.S. at 619; Hudgens v. NLRB , 424 U.S. 507, 513 (1976); Andrews, 998 F.2d at 216, and (2) the circumstances where a private party and a government are so intertwined that the private conduct can be considered "state action" for constitutional purposes are limited to a few defined circumstances, see Edmondson, 500 U.S. at 620; Andrews, 998 F.2d at 217. The Supreme Court has

stated that for a private party's decision to be considered"state action," there must be so much coercion or encouragement that "the choice must in law be deemed to be that of the State." Blum , 457 U.S. at 1004 (citations omitted).

The amended complaint that DeBauche filed makes it clear that the choice not to include DeBauche in Debate Virginia was made by Wilder, not by VCU, and it was not the product of any coercion by the state. Indeed, the invitations to the Republican and Democratic candidates were extended before VCU was even involved. DeBauche did allege significant involvement by the state in making a facility available and in helping to promote the debate, but this assistance to private parties does not transform the private parties' conduct into state action. We have articulated the four exclusive circumstances under which private conduct will be deemed "state action," noting that if conduct "does not fall into one of these four categories, then the private conduct is not an action of the state." Andrews, 998 F.2d at 217. Even though DeBauche could not fit her allegations into any of the four articulated circumstances she nevertheless pursued her action against the private parties, claiming that they violated her constitutional rights as state actors. In these circumstances, we cannot conclude that the district court abused its discretion in ordering the payment of fees and costs under § 1988.

DeBauche and the American Civil Liberties Union, as amicus, have suggested that ordering DeBauche to pay attorneys fees and costs will chill lawsuits by future individuals who feel that their constitutional rights have been violated. But "[w]hen a court imposes fees on a plaintiff who has pressed a `frivolous' claim, it chills nothing that is worth encouraging." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). In fact, in the circumstances of this case, it can just as easily be argued that

groundless lawsuits like DeBauche's might chill broadcasters' and journalists' exercise of their First Amendment rights in organizing political debates.

While we find no abuse of discretion in the decision to order DeBauche to pay fees and costs, we do believe that DeBauche's contention that her financial circumstances should be taken into account has merit. "The policy of deterring frivolous suits is not served by forcing the misguided [§ 1983] plaintiff into financial ruin simply because he prosecuted a groundless case." Arnold v. Burger King Corp., 719 F.2d 63, 68 (4th Cir. 1983). The record shows that DeBauche's combined income for the three years preceding her lawsuit was less than $42,000. Without more information about her resources or her backing for this lawsuit, it would appear that a $48,000 fee award against her would force her into "financial ruin." Because the district court does not appear to have taken into account the financial resources available to DeBauche, we must vacate and remand this part of the district court's judgment.

The defendants argue that the district court took DeBauche's financial means into account when it made her attorneys jointly and severally liable for a portion of the sanction. This, however, is not an appropriate way in which to take into account DeBauche's financial means because, under joint and several liability, she would still remain liable for the full amount of the award. If the court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.

B.

DeBauche contends also that the imposition of sanctions jointly

and severally on her attorneys under 28 U.S.C. § 1927 is error as a matter of law because that provision does not cover the circumstances found by the district court. Section 1927 provides:

> Any attorney or other person admitted to conduct cases . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The unambiguous text of § 1927 aims only at attorneys who multiply proceedings. It "does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980). Rather, this provision "is concerned only with limiting the abuse of court processes." Id. Thus, an attorney who files a meritorious claim and wins a substantial verdict may still be assessed sanctions under § 1927 if, during the case, he "multiplies the proceedings . . . unreasonably and vexatiously." Likewise, an attorney who files a meritless claim may not be sanctioned under§ 1927 if he does not engage in such conduct. Section 1927 focuses on the conduct of the litigation and not on its merits.

In this case, DeBauche's attorneys filed only two documents, a complaint and an amended complaint, and, as to WRVA and WNVT (for whose fees and costs they have been made responsible), they filed only one document, the amended complaint in which WRVA and WNVT were first made parties. We conclude as a matter of law that the filing of a single complaint cannot be held to have multiplied the proceedings

unreasonably and vexatiously and therefore that § 1927 cannot be employed to impose sanctions.

This is not to say, however, that the district court lacks authority to impose sanctions for the filing of a frivolous complaint. Federal Rule of Civil Procedure 11 allows sanctions against attorneys and parties who file pleadings that contain "claims [or] other legal contentions [that] are [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," or factual allegations that have neither evidentiary support nor the likelihood of forthcoming evidentiary support. Fed. R. Civ. P. 11(b)(2), (b)(3), (c).

Accordingly, we also vacate the sanctions imposed under § 1927 and remand to permit the district court to consider sanctions under Rule 11. Whether to impose Rule 11 sanctions, however, is committed to the discretion of the district court.

The judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KING, Circuit Judge, dissenting in part:

Sue Harris DeBauche, the Reform Party's 1997 candidate for Governor of Virginia, alleged that two highly influential employees of Virginia Commonwealth University conspired with others to exclude her from a broadcast debate featuring the Democratic and Republican gubernatorial candidates. According to the First Amended Complaint, VCU president Eugene Trani and Distinguished Professor L. Douglas Wilder were motivated by DeBauche's political views to discriminate

against her.

DeBauche's allegations, which must be taken as true at this initial stage of the proceedings, state a claim for relief against Trani and Wilder pursuant to 42 U.S.C. § 1983. By October 1997, it had been clearly established for at least twelve years that the First Amendment forbids the government to exclude from its forums those speakers with whom it disagrees, solely by reason of that disagreement.

Accordingly, I concur only in Part II of the majority's opinion, which affirms the district court's dismissal of DeBauche's claims against Trani in his official capacity. I dissent from (1) the majority's holding in Part III that Trani was entitled to qualified immunity with regard to the claims against him in his individual capacity; (2) the majority's affirmance in Part IV of the district court's dismissal of the claims against Wilder; and (3) the majority's conclusion in Part V that Wilder, WRVA, and WNVT may be entitled to attorneys' fees and court costs.[1]

I.

A.

We are, of course, compelled to view the facts alleged by DeBauche in the light most favorable to her. See Ostrzenski v.

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1. In addition to concurring in Part II of the majority's opinion, I agree with its affirmance in Part IV of the district court's dismissal of the claims against WRVA and WNVT, based on DeBauche's failure to sufficiently allege that the broadcasters engaged in state action. I also agree with the majority's holding in Part V that the filing of a complaint cannot support an award of sanctions under 28 U.S.C. § 1927.

Seigel, 177 F.3d 245, 251 (4th Cir. 1999) (citation omitted). The district court's dismissal of DeBauche's complaint pursuant to Fed. R. Civ. P. 12(b)(6) can therefore be sustained "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Moreover, in accordance with federal notice-pleading standards, we are bound to construe the complaint liberally. Anderson v. Foundation for Advancement, Educ. & Employment of Am. Indians, 155 F.3d 500, 505 (4th Cir. 1998) (citing Conley at 45-46).

The complaint alleges generally that "[t]he actions of the defendants with respect to Ms. DeBauches's [sic] request for access, participation and expression in Debate Virginia . . . were taken pursuant to the VCU's policies, customs and/or practices and were authorized . . . by the defendants or their agents functioning at a policy making level." First Amended Complaint [hereinafter FAC] at ¶ 56. "[T]he defendants . . . have discriminated against Ms. DeBauche without a reasonable basis and have unlawfully discriminated against her based on her viewpoint . . . ." FAC at ¶ 64. "[T]he defendants' policies, customs and/or practices favor the speech of candidates of the major political parties over speech of candidates from minority political parties and thereby invert cherished First Amendment values promoting dissent, an open electoral process, and free and uninhibited public debate of political questions." FAC at ¶ 71.

DeBauche specifically alleged that Trani was responsible for implementing VCU's policies, and that the enforcement of those policies in this case was achieved with the "active participation, knowledge and/or acquiescence" of Trani and the other defendants. FAC at ¶¶ 8, 68. Wilder, in particular, was alleged

to have "had a subjective appreciation that [his] acts would deprive Ms. DeBauche of her constitutional rights . . . ." FAC at ¶ 84.

B.

The preceding allegations clearly state a § 1983 claim against Trani and Wilder. Taking the averments in the complaint at face value, both defendants would be liable as a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983.

The majority nonetheless affirms the district court's dismissal of DeBauche's complaint against these defendants, holding that (1) Trani is entitled to qualified immunity on the ground that he violated no clearly established constitutional right; and (2) Wilder was not, as a matter of law, a state actor. Ante at 7-8, 10-13. Both conclusions are, in my judgment, erroneous.

1.

The majority identifies the right sought to be vindicated in this case as the First Amendment's prohibition of "content-based or viewpoint- based decisions to exclude candidates from publicly sponsored debates." Ante at 9. According to the majority, our sister circuit's ruling in Chandler v. Georgia Pub. Telecomm. Comm'n , 917 F.2d 486 (11th Cir. 1990), and the Supreme Court's recent holding in Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998), rejecting arguments that third-party candidates must be included in political debates

sponsored by public television stations, preclude the possibility that DeBauche's right to be included in Debate Virginia was clearly established.

To the contrary, DeBauche's right to inclusion became clear more than five years prior to Chandler, with the Supreme Court's decision in Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985). Cornelius employed the analytical framework developed two years earlier in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), with respect to the"recurring and trouble- some issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property." Cornelius, 473 U.S. at 815 (Blackmun, J., dissenting).

Under Perry and Cornelius, it must first be determined whether the property to which the speaker desires access is a traditional public forum, a designated public forum, or a nonpublic forum. Perry, 460 U.S. at 45-46; Cornelius, 473 U.S. at 800, 802. If the forum is public, either by tradition or otherwise, speakers may only be excluded to serve a compelling governmental interest. Cornelius, 473 U.S. at 800. Conversely, if the forum is nonpublic (like Debate Virginia), restrictions on speech need only be reasonable in light of the property's intended purpose. Id. at 806. A speaker may properly be excluded from a nonpublic forum if, for example, she is not a member of the class of speakers for whose benefit the forum was created, or if she wishes to address a topic not within the purpose of the forum. Id.

Even in the case of a nonpublic forum, however, it is abundantly clear that a speaker may not be excluded on the basis of her viewpoint. As Justice O'Connor stated in Cornelius , "the government violates the First Amendment when it denies access

to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." Id. at 806. Moreover, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." Id. at 811 (citations omitted).[2]

DeBauche alleged that Trani, acting on behalf of a state university, excluded her from Debate Virginia to prevent her from publicly expressing her political views. She was indisputably a member of the class of speakers, i.e., ballot-qualified candidates for the office of Governor of Virginia, for whom the forum was created. There is like- wise no dispute that DeBauche wished to speak on the same topics as her Democratic and Republican challengers. Consequently, under Cornelius, DeBauche stated a viable § 1983 claim upon which she must prevail if she can adduce sufficient proof that she was indeed discriminated against on the basis of her viewpoint.

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2. Cornelius involved a challenge by certain legal defense funds to their exclusion from the Combined Federal Campaign (CFC), an annual charity drive targeted at federal employees. The plaintiffs maintained that the prohibition against their participation in the CFC violated their First Amendment right to solicit charitable contributions. The Court held that the CFC was a nonpublic forum, and that the government could reasonably exclude controversial groups whose participation would disrupt the workplace and cause the drive to be less successful. The Court nevertheless remanded the case for the lower courts to determine whether the plaintiffs' exclusion was motivated by the government's desire to suppress their viewpoints.

Neither Chandler nor Forbes altered the basic rule of Cornelius. The debates at issue in those cases were organized and broadcast by state-owned television stations. Although Justice Kennedy's opinion in Forbes acknowledged some uncertainty as to whether the forum doctrine should apply in the "very different context of public television broadcasting," Forbes, 523 U.S. at 673, the Court ultimately decided that the doctrine should apply, at least with regard to political debates. Id. at 675 ("Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule.").

But even a broadcaster cannot do what Trani is alleged to have done in this case:

> [T]he requirement of neutrality remains; a broadcaster cannot grant or deny access to a candidate debate on the basis of whether it agrees with a candidate's views. Viewpoint discrimination in this context would present not a calculated risk, . . . but an inevitability of skewing the electoral dialogue . . . . The debate's status as a nonpublic forum did not give [the defendant] unfettered power to exclude any candidate it wished.

Id. at 676, 682 (citation, internal quotation marks, and brackets omitted); accord Chandler, 917 F.2d at 489 ("[W]e can safely predict that the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment.").

At bottom, neither VCU nor Trani is a broadcaster. There is no justification, then, for the majority's assertion that either Chandler or Forbes -- pertaining to broadcasters -- announced

the standard against which Trani was expected to measure his conduct. That standard was set much earlier, in Cornelius. Viewed in their proper con- text, Chandler and Forbes merely extended the rule of Cornelius to encompass the peculiar realm of public television and radio broad- casters that organize political debates.

It is no answer to say that Cornelius was not a debate case, and therefore has no application here. Cornelius was a forum case, and a political debate is perhaps the quintessential forum. The law requires that qualified immunity be denied government officials who transgress those rights "of which a reasonable person would have known." Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir. 1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). A reasonable person in Trani's position would have been aware that Cornelius forbade the type of viewpoint discrimination in which he is alleged to have engaged.[3] Consequently, I must conclude that Trani is not entitled to qualified immunity on the face of the complaint.

2.

The majority asserts that Wilder, in his role as a radio personality and political figure, cannot be considered a state

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3. It is likewise immaterial that WRVA and WNVT were alleged to have participated in the decision to exclude DeBauche. Although these private broadcasters are not state actors and are thus impervious to this lawsuit, ante at 11-14 (citing Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214 (4th Cir. 1993)), Trani cannot cloak himself in their invulnerability. The mere happenstance that broadcasters are present on the periphery does not limit our consideration of the relevant precedents to Forbes and Chandler.

actor with regard to his involvement in Debate Virginia. The majority overlooks, however, that Wilder was also a contract employee of VCU. The materials submitted below reveal that Wilder was appointed in 1995 to the position of Distinguished Professor in VCU's Center for Public Policy. See Appendix to Plaintiff's Opposition to the State Defendants' Motion to Dismiss, at 16 (J.A. 57). Indeed, the record contains no fewer than eight letters pertaining to Debate Virginia that were drafted by Wilder or his staff on VCU's letterhead. During DeBauche's ongoing efforts to be included in the debate, she and other members of the Virginia Reform Party attempted to telephone Wilder at his VCU offices. FAC at §§ 46, 48.

Although the district court granted Wilder's motion to dismiss without considering any materials beyond the complaint, we are not bound to follow the same path. See McNair v. Lend Lease Trucks, Inc., 62 F.3d 651, 656 (4th Cir. 1995) (court of appeals has the discretion to note a critical fact contained in a document submitted to, but not considered by, the district court in ruling on a motion under Rule 12(b)(6), where the parties are aware that materials outside the pleadings are before the court), reasoning adopted by McNair v. Lend Lease Trucks, 95 F.3d 325, 328 n.3 (4th Cir. 1996) (en banc) (vacating remainder of panel decision).

Absent discovery, it is impossible to ascertain the extent to which Wilder acted on behalf of VCU with regard to the organization and administration of Debate Virginia. Insofar as Wilder was indeed attempting to further the interests of his university employer, he was plainly engaging in state action within the contemplation of § 1983, and is therefore potentially

liable to DeBauche.[4] The question cannot, in any event, be resolved as a matter of law on a motion to dismiss.

II.

Because I would reverse the district court's dismissal of DeBauche's § 1983 claim against Wilder, it follows that I would likewise reverse the concomitant award of fees and costs. Though I agree with the majority that WRVA and WNVT cannot be deemed state actors in this case, see supra note 1, I do not think that DeBauche's assertions to the contrary are so "groundless or without foundation" as to justify a fee award under § 1988(b). Ante at 16 (noting standard). Particularly in light of Wilder's professional association with WRVA, I would not discount the possibility that DeBauche could have credibly alleged that Wilder coerced the radio station to adopt his position with regard to DeBauche's exclusion from the debate, thereby satisfying the first Andrews scenario, see ante at 12 (noting that a private party may engage in state action where "the state has coerced the private actor to commit an act that would be unconstitutional if done by the state").[5]

III.

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4. For the reasons I have expressed supra in Section I.B.1., Wilder -- like Trani -- would not be entitled to qualified immunity on the facts as alleged by DeBauche.

5. Nor do I believe that sanctions pursuant to Rule 11 are appropriate in this case. Given the seriousness of the alleged conduct, the Supreme Court's consistent condemnation of viewpoint discrimination, and the unusual facts present here, DeBauche could make a nonfrivolous argument for the modification or extension of existing law to hold the broadcasters liable as state actors.

This is an important case that has come to a premature conclusion. State colleges and universities are places in which the infinite diversity of human thought should be celebrated. Such institutions ought not be in the business of suppressing divergent viewpoints, a concept antithetical to the Constitution and to the cherished values upon which this nation was founded. We can only hope that, in this case, Sue Harris DeBauche was not silenced on account of her views as to how the Commonwealth of Virginia could best be governed. Unfortunately, as the result of the majority's decision today, we may never know.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

MEMORANDUM OPINION

THIS MATTER is before the Court on four motions by the defendants. The first is a motion to dismiss the Amended Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure by the defendants Virginia Commonwealth University ("VCU") and VCU President Eugene Trani, in both his individual and official capacities (collectively, "University Defendants"). The second is a motion to dismiss the Amended Complaint under Rule 12(b)(6) by the owner of television station WNVT, Central Virginia Educational Telecommunications. Inc. ("CVETC"). The third is a motion to dismiss, or in the alternative motion for summary judgment, by Clear Channel Radio, Inc. ("Clear Channel Radio"), the owner of radio station WRVA. Finally, the fourth is a motion by Lawrence Douglas Wilder ("Wilder") to dismiss under Rule 12(b)(6) or for summary judgment under Rule 56. For the

reasons expressed below, the Court GRANTS the University Defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6) as well as CVETC, Clear Channel Radio and Wilder's motions to dismiss under Rule 12(b)(6).

I. Background

The plaintiff Sue Harris DeBauche ("DeBauche") is the State Chairman of the Virginia Reform Party. She was a state-qualified and balloted Virginia Reform Party candidate for Governor of Virginia in the 1997 election. This case concerns DeBauche's exclusion from a gubernatorial debate entitled "Debate Virginia."

In April 1997, former Governor Wilder, who was a radio personality at WRVA, proposed and planned a debate between James S. Gilmore III ("Gilmore") and Donald S. Beyer ("Beyer"), who at the time were the only duly-qualified candidates for Governor. Some time after, VCU and President Trani offered the premises of VCU as a forum in which to hold the debate and offered to contribute VCU personnel, staff and other resources to promote, manage and execute the debate. On or about September 10, 1997, Wilder accepted VCU's offer to hold Debate Virginia. This debate was then promoted to the public by VCU and radio station WRVA. Between September 15, 1997[6] and October 1, 1997, DeBauche made requests to participate in Debate Virginia but she never received a response from Wilder or VCU.

Nonetheless, Debate Virginia was held on October 6, 1997 with only Gilmore and Beyer as participants. It was held

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1. September 15 is the date on which DeBauche became duly-qualified as a candidate for Governor.

before an audience of hundreds of invited guests and was broadcast to most areas of Virginia, including live broadcasts by the defendants WRVA and WNVT, among others. Soon after, on or about October 21, 1997, DeBauche made a written demand to VCU and Trani that they schedule a gubernatorial debate including Gilmore, Beyer and herself prior to the November 4, 1997 election to remedy the supposed damage done to DeBauche and her Party. VCU and Trani rejected this demand three days later.

In the November 4 election, Gilmore won. DeBauche failed to garner ten percent of the vote, the amount needed for the Reform Party to have automatic ballot access in the next race. As a result, she has brought this suit against the University Defendants, Wilder, CVETC and Clear Channel Radio.

The Amended Complaint has four counts.[7] Count one alleges that the defendants violated DeBauche, the Reform Party and its members' constitutional rights to free speech and freedom of association as guaranteed by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Count two claims that the defendants' actions violated their rights to equal protection under the Fourteenth Amendment and 42 U.S.C. § 198 3 "by unlawfully discriminating on the basis of the content or viewpoint of her speech." Count three alleges that the defendant violated their rights to equal protection under the Fourteenth Amendment and 42 U.S.C. § 1983 by "unlawfully classifying the duly-qualified and -balloted candidates for Governor of Virginia without a

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2. The original complaint was filed on October 15, 1997. After reviewing documents from Beyer and Gilmore as well as VCU's web site, DeBauche amended the complaint to add WRVA and CVETC as defendants.

reasonable or compelling state interest and in a manner that failed to satisfy constitutional requirements." Finally, Count four claims their rights under the Ninth and Fourteenth Amendments and 42 U.S.C. § 1983 were violated by the defendants. The University Defendants, Clear Channel Radio, CVETC and Wilder have moved for dismissal of the Amended Complaint.

II. Discussion

A. Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move for dismissal of a claim on the grounds of failure to state a claim upon which relief can be granted. When considering such a motion, the Court must presume that all factual allegations in the complaint are true. Martin Marietta v. International Telecommunications Satellite Org., 991 F.2d 94, 97 (4th Cir. 1992). All reasonable inferences must be construed in the light most favorable to the non-moving party. Id. The Court should not dismiss any claim unless it appears beyond a doubt that the plaintiff could not recover under any set of facts which could be proven. Conley v. Gibson, 355 U.S. 41,45-46 (1957); Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995).

The standard of review for a 12(b)(1) motion in turn, is a function of the motion's purpose. Where the motion constitutes a facial attack upon the complaint's allegations of subject matter jurisdiction, the Court must presume that all factual allegations in the complaint are true, Puerto Rico ex. rel. Quiros v. Alfred L. Snapp & Sons, 632 F.2d 365 (4th Cir. 1980), aff'd, 458 U.S. 592 (1982), and make all reasonable inferences in the plaintiffs favor. Johnson v. Mueller, 415 F.2d

354 (4th Cir. 1969); MacKethan v. Peat, Marwick, Mitchell & Co., 439 F. Supp. 1090 (E.D. Va. 1977). In this case, however, the motion challenges the actual existence of the Court's subject matter jurisdiction. In such a situation, the Court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993) (citations omitted). See Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). It is the plaintiffs burden to prove that jurisdiction in this Court is proper. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Fleming v. Workers' Comp. Comm'n, 878 F. Supp. 852,857 (E.D. Va. 1995) aff'd, 78 F.3d 578 (4th Cir. 1996). While the Court will read the plaintiffs complaint as a whole and will construe it broadly and liberally, it is not bound to draw argumentative inferences in the plaintiffs favor. Flue-Cured Tobacco Coop. v. United States EPA, 857 F. Supp. 1137, 1140 (M.D.N.C. 1994).

B. Analysis

The Court must first note that, although the election has occurred, the claims in DeBauche's Amended Complaint are not moot. It is more than conceivable that DeBauche as a Reform Party candidate for a political office will be excluded from a debate including only Democratic and Republican candidates and involving a state university. Even though DeBauche may attempt a preliminary injunction to stop such a debate, a court's final resolution of the matter may not occur before the election. particularly if the debate were to occur in the few weeks before the election. The effects on minority-party candidates like DeBauche from the circumstances presented in this case will persist in future elections but "within a time frame too short to allow resolution through litigation."

See Johnson v. F.C.C., 829 F.2d 157, 159, n. 7 (D.C. Cir. 1987).

However, DeBauche lacks standing to assert claims on behalf of the Reform Party. The alleged harm committed by the defendants was to exclude DeBauche from Debate Virginia. DeBauche does not allege, and cannot seriously allege, that the defendants have control over the gubernatorial election, its results, or automatic ballot access so that the Reform Party's loss of automatic ballot access can be attributed to the defendants. Therefore, the alleged injury to the Reform Party is tenuously related to the alleged harm to DeBauche. Moreover, there is no indication that the Reform Party has designated DeBauche to bring this suit on its behalf for any injury. See Marshall v. Meadows, 921 F. Supp. 1490,1493 (E.D. Va. 1996) (explaining party member cannot have standing when representing the party's interests if the party itself has not sought suit).

With that said, the Court will address the parties' arguments in two groups: the University Defendants and then the remaining defendants, who are all private parties.

1. The University Defendants

i. Eleventh Amendment

The Eleventh Amendment generally precludes lawsuits against the states, state agencies, or individual state officers in their official capacity. Seminole Tribe v. Florida, 517 U.S. 44 (1996). According to the University Defendants, because VCU is a state-supported institution, it is considered the Commonwealth of Virginia for purposes of the Eleventh Amendment and cannot be sued. In Harter v. Vernon, 101 F.3d

334,341 (4th Cir. 1996), cert. denied, 117 S.Ct. 2511 (1997), the Fourth Circuit stated its four-pronged test for determining whether an entity is an "arm of the state" and, thus, enjoys Eleventh Amendment immunity. The four factors are: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exercises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how it is treated as a matter of State law. Id. at 340 (quotations and citation omitted). A court's inquiry should begin with the most important factor, which concerns the state treasury, and "if the State Treasury will pay the judgment, then the entity is immune and the other . . . factors need not be considered." Id.

In the case at bar, any judgment paid by VCU will be paid from the Virginia state treasury, as the state treasury is a major source of funds for the university.[8] This circumstance alone satisfies the Harter test.[9] VCU is an "arm of the state,"

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3. Even when VCU receives funds from sources outside of the state treasury, such as student fees, Virginia law requires that these funds from private sources be deposited into the Commonwealth's treasury and be appropriated by the Virginia General Assembly. See Va. Code § 2.1-180 (state agencies required to deposit funds "from any source" in state treasury, except for "endowment" funds).

4. 'The other factors under the Harter test fall in VCU's favor as well. VCU is controlled by a Board of Visitors. whose members are appointed by the Governor and approved by Virginia's General Assembly. See Va. Code § 23-50.6. VCU is under the control of the General Assembly. See Va. Const. art. VIII, § 9. Additionally, VCU's purpose of higher education is

and, consequently, the Eleventh Amendment applies here. A complaint alleging a claim under section 1983 does not constitute a waiver of a state's Eleventh Amendment immunity. Will v. Michigan Dep't State Police, 491 U.S. 58, 66 (1989). Therefore, the Court grants VCU's motion under Rule 12(b)(1) to dismiss all claims against it on the ground that VCU has not waived its immunity under the Eleventh Amendment. This leads to the question: do the claims against President Trani still stand?

With respect to the damages claims against President Trani in his official capacity, he is also considered an "arm of the state" for purposes of the Eleventh Amendment. See Will, 491 U.S. at 70-71 ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.").[10] Yet state officials are not

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a statewide, rather than a local, concern. Finally, See Va. Code § 23-50.4 (establishing VCU as a state entity). Its operating funds are substantially derived from Virginia's state tax revenues, and, like other state agencies and institutions, the Attorney General is the legal counsel and advisor for VCU.

5. In any event, the claim against President Trani is barred by the doctrine of qualified immunity. The doctrine of qualified immunity provides that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). DeBauche has not alleged that President Trani played any role in the decision to invite only Gilmore and Beyer for Debate Virginia; therefore, she has not sufficiently alleged that he discriminated against her. No "clearly established statutory or constitutional right" was

necessarily immune from suits to enjoin alleged continuing violations of federal law, Ex Parte Young, 209 U.S. 123, 159-60 (1908), nor are they immune under the Eleventh Amendment from suits for declaratory relief and damages in their individual capacity, Hafer v. Melo, 502 U.S. 21 (1991). In the case at bar, DeBauche has not alleged that President Trani has been engaged in a continuing violation of her constitutional rights. Rather, the Amended Complaint asks for "a mandatory injunction commanding the defendants, their officers, employees, agents, successors or assigns, etc., to enjoin the defendants' interference with her exercise of her constitutional rights in the future." Amended Compl. at para. 102. In other words, DeBauche would like an injunction that would prohibit President Trani from violating a right that he is not currently violating. Unlike the situation in Young, DeBauche does not allege that President Trani is now engaged in an action that requires any federal intervention. As there is no allegation of a continuing violation, the Young exception does not apply. See Green v. Mansour, 474 U.S. 64 (1985) (affirming that Young exception limited to situations involving continuing violations of federal law). Consequently, Trani has complete Eleventh Amendment immunity in his official capacity.

ii. State Action by President Trani in His Individual Capacity

In order to allege a claim under section 1983,[11] a

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alleged to have been violated.

6. Section 1983 provides that [e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . subjects any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by

complaint must allege that the defendant's actions denied a federal right and occurred under color of law. This "under color of law" requirement is the same as the state action requirement for a claim under the Fourteenth Amendment. Lugar v. Edmondson Oil. Co.. Inc., 457 U.S. 922,928 (1982). DeBauche essentially argues that, because VCU jointly sponsored the debate, all of the individual organizers were state actors, and they should be accountable for her exclusion. VCU, on the other hand, convincingly argues that DeBauche's brand of "sponsorship" is an insufficient theory of state action. Here, VCU's "sponsorship" occurred after Wilder's decision to invite only Beyer and Gilmore, and this "sponsorship"included only VCU's providing access to its facilities, use of certain managers and publicity. Even in a situation where the government or a state entity had a significant role in organizing a speaking event, the Fourth Circuit has held that the government's involvement did not necessarily make the private organizers state actors. In United Auto Workers v. Gaston Festivals, 43 F.3d 902 (4th Cir. 1995), a city and a nonprofit corporation co-sponsored an annual festival to be held on public streets and private property. The private organizers barred the distribution of any controversial material at the festival. The United Auto Workers wanted to distribute controversial materials and was denied access; it sued. The Fourth Circuit held that, despite the city's $10,000 donation, its authority to permit the event and its commitment to provide municipal services, the private organizers were not state actors. Id. at 914.

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the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

In fact, an attempt by VCU in the instant case to dictate whom any private organizer could invite would threaten that individual's First Amendment rights. In Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996), cert. denied, 117 S.Ct. 2409 (1997), a city leased its commons to the Bush Re-Election Campaign for a political rally and provided substantial promotional support as well as organizational assistance. The Campaign prohibited any critical expression of Bush at the rally. Still, the Sixth Circuit found that the rally did not violate First Amendment rights of those who wished to attend the rally in order to oppose the Bush message. According to the Court, "the present case strongly suggests that the city could not have required the committee to include in the rally persons imparting a message that the committee did not wish to convey." Id. at 198.

The government's role in Sistrunk and Gaston Festivals was as extensive as it was through VCU in the case at bar. VCU's level of sponsorship is not enough to make President Trani in his individual capacity a state actor. Thus, the Court grants the University Defendants' motion to dismiss the Amended Complaint as to Trani in his individual capacity for failure to sufficiently allege state action.

2. CVETC, Clear Channel Radio and Wilder

i. State Action

Again, in order to allege a claim under section 1983, a complaint must allege that the defendant's actions denied a federal right and occurred under color of law. The conduct that allegedly caused denial of a federal right must be "fairly attributable to the State." Lugar, 457 U.S. at 937. There are

two prongs to the fair attribution test. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Id. Then, "the party charged with the deprivation must be a person who may fairly be said to be a state actor," and this last prong may be satisfied if the defendant "acted together with or has obtained significant aid from state officials." Id.

DeBauche does not come close to satisfying this second prong. In the Amended Complaint, DeBauche claims that CVETC and Clear Channel Radio denied her rights under the First Amendment and the Equal Protection Clause by excluding her from Debate Virginia. Her claim hinges on the allegation that CVETC and Clear Channel Radio, both private corporations, "jointly sponsored" Debate Virginia with state entity VCU. Yet the Amended Complaint does not sufficiently allege that Clear Channel Radio and CVETC acted under color of law; it fails to allege facts that show Clear Channel Radio and CVETC were "intertwined in a 'symbiotic relationship'" with VCU involving DeBauche's exclusion from Debate Virginia. See Haavistola v. Community Fire Co. of Rising Sun, Inc., 6 F.3d 2 11. 2 15 (4th Cir. 1993). Joint "sponsorship" of the debate, here, publicizing and airing it, is not equivalent to joint involvement in the decision to exclude certain individuals from the debate. There are simply insufficient allegations of fact to permit the Court to reach the conclusion that CVETC and Clear Channel Radio have acted under color of law in the decision to exclude the debate. Consequently, the Amended Complaint against CVETC and Clear Channel Radio must be dismissed for failure to state a claim upon which relief can be granted.

Moreover, there is insufficient joint involvement between VCU and Wilder in the decision to exclude certain

individuals from the debate. As expressed earlier concerning President Trani in his individual capacity, the level of VCU's involvement was not enough to attribute state action to any of the defendants here.[12] Wilder alone decided to invite only Gilmore and Beyer, and he has a First Amendment right to do so even if the debate occurred on the grounds of a state university. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) (holding state courts' application of public accommodations law to essentially require defendants to alter expressive content of parade by including homosexual, lesbian and bisexual group violated parade organizers' First Amendment rights); Sistrunk, 99 F.3d 194 (holding no First Amendment violation where city leased town commons to private political organization for holding a rally and that organization in turn prohibited plaintiff due to her political speech). Since Wilder was also not acting under color of law, the Amended Complaint must be dismissed to him, as well, for

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7. With no legitimate claim of joint action, as the Fourth Circuit stated in Andrews v. Federal Home Loan Bank of America, 998 F.2d 214 (4th Cir. 1993), a private party can be deemed a state actor in only four contexts: (1) when the state coerced the private actor to commit an act that would be unconstitutional if done by the state: (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; and (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. Id. at 2 17. DeBauche does not allege that any of those contexts exist here for any of the private parties.

failure to state a claim upon which relief can be granted.[13]

ii. Attorney's Fees and Costs

CVETC, Clear Channel Radio and Wilder also request attorney's fees and costs. Title 42, section 1988 of the United States Code states that in a section 1983 action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Courts have construed section 1988 to mean that the defendant is entitled to a fee award where the action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978). The Court has determined that DeBauche's claims against CVETC and Clear Channel Radio were without foundation, as the two were not even alleged to have played a role in the decision to exclude her from the debate. As for Wilder, he had a First Amendment right to not include DeBauche, and her attempt to make him a state actor because VCU only helped execute the debate was baseless and unreasonable. Therefore, CVETC, Clear Channel Radio and Wilder may pursue their requests for attorney's fees.

III. Conclusion

In short. the Court GRANTS the University Defendants' motion to dismiss the Amended Complaint as to VCU and

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8. CVETC, Clear Channel Radio and Wilder also claim that they have qualified immunity to this suit. However, qualified immunity is only available to government officials, not private individuals and corporations. See Wyatt v. Cole, 504 U.S. 158 (1992).

President Trani in his official capacity under Rule 12(b)(1) due to Eleventh Amendment immunity. The Court GRANTS the motion to dismiss the Amended Complaint as to
President Trani in his individual capacity under Rule 12(b)(6) for failure to sufficiently allege state action. The Court GRANTS CVETC, Clear Channel Radio and Wilder's motions to dismiss the Amended Complaint under Rule 12(b)(6) for failure to sufficiently allege state action as well as CVETC, Clear Channel Radio and Wilder's requests for attorney's fees and costs. CVETC, Clear Channel Radio and Wilder may pursue their requests for costs by submitting a bill of costs as outlined by the Local Rules. and they may pursue their requests for attorney's fees by submitting further supporting documentation to the Court. They must file the requests for costs and documentation for attorney's fees within fourteen (14) days from the date of entry of the Order concerning the motions to dismiss. After the issue of costs and attorney's fees is resolved, the case will be dismissed.

An appropriate Order shall issue.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

APR 13 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

ORDER

THIS MATTER is before the Court on four motions by the defendants. The first is a motion to dismiss the Amended Complaint under Rules 12(b)(l) and 12(b)(6) of the Federal Rules of Civil Procedure by the defendants Virginia Commonwealth University ("VCU") and VCU President Eugene Trani, in both his individual and official capacities (collectively, "University Defendants"). The second is a motion to dismiss the Amended Complaint under Rule 12(b)(6) by Central Virginia Educational Telecommunications, Inc. ("CVETC"), the owner of public television station WNVT. The third is a motion to dismiss, or in the alternative motion for summary judgment, by Clear Channel Radio, Inc., the owner of radio station WRVA. Finally, Lawrence Douglas Wilder ("Wilder") brings a motion to dismiss and a motion for summary judgment on the same grounds.

For the reasons expressed in the accompanying Memorandum Opinion, the Court hereby GRANTS the University Defendants' motion to dismiss the Amended Complaint: (1) under Rule 12(b)(1) as to VCU and President Trani in his official capacity for damages and (2) under Rule 12(b)(6) as to President Trani for all other forms of relief and in his individual capacity. The Court GRANTS CVETC, Clear Channel Radio and Wilder's motions to dismiss under Rule 12(b)(6); thus, Wilder's motion for summary judgment is moot.

Let the Clerk send a copy of this Order to all parties of record.

It is SO ORDERED.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

APR 13 1998
DATE

IN THE UNITED STATES DISTRICT COURT
VIRGINIA FOR THE EASTERN DISTRICT OF
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

MEMORANDUM OPINION

THIS MATTER is before the Court on a motion to determine the reasonableness of attorney's fees requested under 42 U.S.C. § 1988 by defendants Clear Channel Radio t/a WRVA, Central Virginia Educational Telecommunications, Inc. ("CVETC") t/a WNVT, and L. Douglas Wilder ("Wilder"). Also before the Court are motions by Clear Channel Radio and CVETC for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

For the reasons stated below, the Court hereby GRANTS the defendants' requests, but alters the amount of fees. The Court also GRANTS Clear Channel Radio and CVETC's motions for attorney's fees and costs pursuant to 28 U.S.C. § 1927. Therefore, DeBauche and her counsel are jointly and severally liable for attorney's fees and costs incurred by Clear Channel Radio and CVETC.

I. Discussion

A. Standard of Law

In an April 13,1998 Memorandum Opinion and Order, the Court awarded Clear Channel Radio, CVETC and Wilder reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988. However, the Court's ruling that the defendants were entitled to a grant of attorney's fees brings the defendants "only across the statutory threshold." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Attorneys seeking an award of fees must submit an affidavit providing requisite evidentiary support for the party's entitlement to fees, as well as "satisfactory specific evidence of the prevailing market rates in the relevant community" for the type of work for which he seeks an award." Plyler v. Evatt, 902 F.2d 273, 277 (4th Cir. 1990) (quotations and citations omitted).

To grant a fee application, the Court must make a further determination from the fee applications whether the fee that is sought is 'reasonable.' Hensley, 461 U.S. at 433. For instance, some cases may be overstaffed, and the skill and experience of the lawyers may vary widely. Id. at 434. Additionally, any hours which are excessive, redundant, or otherwise unnecessary must be excluded from the fee award. Id. Further, "where the documentation of hours is inadequate, the district court may reduce the award accordingly." Id. at 433.

The crux of calculating a reasonable attorneys' fee award is in determining the lodestar figure. Daly v. Hill, 790 F.2d 1071, 1078 (4th Cir. 1986). The lodestar figure is calculated by multiplying the number of reasonable hours expended by a reasonable rate. Id. at 1077. In determining the

reasonable rate and reasonable hours, the Fourth Circuit has announced that the Court must use what are called the Johnson factors. Id. at 1078. Thus the Court must consider the following:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to properly perform the legal service;
(4) the preclusion of other employment by the attorney due to acceptance of case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson v. Georgia Highway Express. Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). If the lodestar figure is properly calculated, adjustment will most likely be unnecessary. Daly, 790 F.2d at 1078. A proper lodestar calculation will accomplish fair and reasonable compensation and will constitute a reasonable fee contemplated by § 1988. Id.

B. Analysis

Now, the Court will address each defendant separately, for the defendants have supported their requests with varying degrees of documentation and legal argument.

1. Clear Channel Radio

Again, the starting point for determining an attorney's fee award is to multiply the number of hours reasonably expended by a reasonable hourly rate. In order to make this determination, the Court must turn to the Johnson factors and the record presented to it. Clear Channel Radio employed the law firm of Mays & Valentine, LLP, which has submitted its billing records totaling $13,321.50 plus 3,049.08 for working on this attorney's fees issue. In Mays & Valentine's Verified Bill of Costs and Documentation of Attorney's Fees, it appears the number of hours expended by partner Robert Brooke were 29.8 at $185-190 an hour; associate Andrew Mauck were 50.6 at $135-150 an hour; and by attorney P.C. Baxa were 2.0. In addition, Mauck spent 19.7 and Brooke spent 1.5 on the instant dispute over attorney's fees for a grand total of approximately 103.6 hours.

i. Time and Labor Required

In sum, the billing records reflect work in (1) analyzing the Amended Complaint, (2) legal research, (3) factual discovery that included reviewing documents in the record and interviewing witnesses, (4) filing a motion to dismiss and supporting memorandum, including an alternative motion for summary judgment, (5) filing a motion to stay discovery, and (6) preparing for and attending oral argument. Mays & Valentine adds that they used sound billing judgment. They had associate Mauck perform most of the work to save costs. They filed motions and memoranda only on issues relevant to Clear Channel. They incorporated by reference CVETC's memoranda in its motion to dismiss, and they decided not to pursue oral argument on Clear Channel's motion to dismiss after listening to the other defendants' motions at the January 26, 1998 hearing. To further save money, they moved to stay discovery pending the Court's decision on the motion to dismiss and then decided not to present oral argument on the motion.

The Court has carefully reviewed both the April 27, 1998 Verified Bill of Costs and Documentation of Attorney's Fees as well as the May 21, 1998 Supplementation, and the Court has determined some of the hours listed were either not required labor or inappropriate time. In certain instances, there was duplicative billing by the law firm. For example, on January 19, 1998, both Brooke and Mauck bill for the same strategy and scheduling conference with each other. This is also duplicative, and the Court will consider only Brooke's time. Next, on January 26, 1998, both Brooke and Mauck bill for a conference with each other and their attending the motion to dismiss hearing, among other things. As for the conference, the Court will allow only 2.4 hours at Brooke's billing rate of $190 an hour. However, neither lawyer argued on behalf of Clear Channel at the January 26, 1998 hearing. The Court cannot conclude that Clear Channel's lawyers merely attending the hearing was required time.

On January 30, 1998, Brooke and Mauck had a conference with each other concerning brief editing. Finding this also duplicative, the Court will consider only Brooke's billing. There was also duplicative billing concerning things other than conferences. On January 12, 1998, both Brooke and Mauck bill for e-mails that they share regarding the scheduling of the January motion to dismiss hearing. This is duplicative and the Court will consider only Mauck's billing because it includes a conference with Attorney Knicely. Finally, on April 14, 1998, both Brooke and Mauck bill for reviewing this Court's opinion on the motion to dismiss. This is duplicative and the Court reduces Mauck's 2.4 hours time entry by the amount claimed by Brooke, which is 1.2 hours. Further, the Court believes that the numerous conferences within the firm on the day of January 5, 1998, were excessive and that only half of the time was required.

There was more than just duplicative billing. The Court also believes that the time and labor of Philip Baxa, who was not even counsel of record, is not required in light of Brooke and Mauck's work. Therefore, the Court has not considered the 2.0 hours claimed by Baxa on Mays' records.

ii. Novelty and Difficulty of the Questions

Clear Channel argues that DeBauche has herself to blame for making the case overly complicated and expensive, as she was the one who tiled an Amended Complaint 30 pages long with over 100 paragraphs and multiple counts under the First, Ninth, and Fourteenth Amendments of the U.S. Constitution, 42 U.S.C. § 1983, and 28 U.S.C. § 2201-2202. She even sought nominal, compensatory and punitive damages, costs and attorney's fees against Clear Channel. Clear Channel adds that she had a "high-powered and high-profile legal team" including the law firm of Knicely and Cotorceanu, P.C.; attorney Thomas S. Neuburger, P.A. who is a legal specialist from Delaware; Professor James Raskin of American University; and John Whitehead of the Rutherford Institute. Further, DeBauche filed briefs in excess of 190 pages that cited dozens of cases implicating free speech law in the area of political debates, voting and rights of association.

Yet the Court would characterize the case as somewhat difficult. There were novel First Amendment arguments raised, but the pivotal issue for Clear Channel was whether it could be characterized as a state actor, which is a commonly litigated issue in Section 1983 cases.

iii. Skill Requisite to Perform the Legal Service Properly

Clear Channel argues that the case required lawyers skilled in constitutional law and complex litigation, such as

Brooke and Mauck from Mays & Valentine. While the Court would agree that the Complaint presented constitutional questions, the Court believes that the most desirable attribute for proper legal service in this matter was Section 1983 experience, which both Brooke and Mauck attest to having.[1]

iv. Customary Fee

In considering this factor, the Court is reminded that "the proper measure of fees is the prevailing market rate in the relevant market, and not the rate charged by the actual attorney in question." See Trimper v. City of Norfolk, 58 F.3d 68,76 (4th Cir. 1995). The determination is fact-intensive and best guided by what attorneys earn from paying clients for similar service in similar circumstances. Blum v. Stenson, 465 U.S. 886, 895 (1984). Evidence of fees paid to attorneys of comparable skill in similar circumstances is relevant, as well as the rate actually charged by the petitioning attorneys when it is shown-that they have collected those rates in the past from the client. See Rum Creek Coal Sales. Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994).

Affidavits by attorneys Yvonne Wellford and Michael

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1. Brooke, a partner in the firm's business and commercial litigation section, has previously represented clients involved in Section 1983 litigation, including the appeal of a favorable ruling in a Section 1983 case to the United States Court of Appeals for the Fourth Circuit.

Mauck, an associate in the same firm section, has previously been involved in cases representing plaintiffs in Section 1983 and those involving constitutional issues of free speech and the right to associate.

Condyles of the law firm Maloney, Huennekens, Parks, Gecker & Parsons as well as the 1996 Law Firm Statistical Survey tendered by Clear Channel support that the hourly rates for Brooke and Mauck are reasonable and fall within the range for partners and associates, respectively, in the Eastern District of Virginia.[2] Further, this Court is aware of the prevailing rates in Richmond, having presided over many cases of this type, and concludes that the rates at issue here fall within the norm. See Hardman v. Bd. of Education, 714 F.3d 823 (8th Cir. 1983) (district court did not err in failing to hold evidentiary hearing on issue of attorney's fees under Section 1988 since district judge must be deemed well aware of attorney fees currently charged by attorneys performing similar work in the community).

v. Amount Involved and Results Obtained

Based on its motion to dismiss, the Court dismissed the entire case and determined that there was no basis for DeBauche's claims against Clear Channel. Thus, Clear Channel obtained successful results and avoided compensatory and punitive damages claims even though it did not prevail on the qualified immunity and mootness issues. The attorneys point out, though, that they spent little time on those issues.

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2. Wellford states that Brooke and Mauck's rates fall within the range for experienced lawyers and associates in civil rights litigation in the Eastern District of Virginia. Condoyles adds that regular rates for experienced lawyers in business and commercial litigation cases generally range from $150 to $250 per hour and for senior associates from $145 to $195 per hour. The Survey, in turn, compared ten comparable Virginia and North Carolina firms and illustrates that Brooke and Mauck's fees are within the median range.

vi. Experience, Reputation and Ability of the Attorneys

As earlier discussed, both Brooke and Mauck have Section 1983 experience. Brooke has been practicing since 1984, and Mauck has been practicing since 1991.

vii-Nature and Length of the Professional Relationship, with Client

Mays & Valentine has represented Clear Channel for many years and has always charged Clear Channel the firm's standard billing rates.

viii. Awards in Similar Cases

Clear Channel claims that it cannot find similar cases but that the cases law demonstrates that it is seeking "a very low amount in this type of litigation." See Superior Form Builders v. Dan Chase Taxidermy Supply Co.. Inc., 881 F.Supp. 1021 (E.D. Va. 1994) (awarding $74,104.50 in attorney's fees but after jury verdict); Morse v. Republican Party, 972 F.Supp. 355 (E.D. Va. 1997) (awarding $85,882.50 in attorney's fees). DeBauche has not tendered to the Court any examples of awards.

ix. The Remaining Johnson Factors

As for the other factors, such as whether the attorneys were precluded of other employment due to their acceptance of this case, the attorneys have not offered argument. However, the Court does not believe that this case, which did not progress beyond a motion to dismiss and involved Clear Channel for about five months, prevented Brooke and Mauck from taking on other cases. Also, Clear Channel offers no argument as .to

Johnson factors (6), (7) and (10). It appears, though, that the case was accepted on a fee basis, and the Court has no indication that any time limitations were imposed by Clear Channel on Mays & Valentine. There also appears no reason why the case would be considered "undesirable."

x. Determining the Lodestar

Upon consideration of the Johnson factors, above, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of this case:

	Hours	Rate	Fee
Robert Brooke	0.5	$180.00	$90.00
	28.6	$190.00	$5,434.00

	Hours	Rate	Fee
Andrew Mauck	19.7	$135.00	$2,659.50
	37.0	$150.00	$5,550.00

TOTAL/Lodestar Figure: $13,733.50

xi. Expenses

"In determining an award of attorney's fees, litigation expenses, such as supplemental secretarial costs, copying, telephone costs, and necessary travel, are integrally related to the work of an attorney and, thus, are compensable." Superior Form Builders, 881 F.Supp. at 1029 (quotations and citation

omitted). Here, Clear Channel asks for $189.30 in copying and printing costs for its motion to dismiss and supporting memoranda. It also asks for an additional $64.08 in costs and expenses for work on the attorney's fees request. While the first request appears reasonable,[3] the latter is problematic. Clear Channel provides no account of how these costs and expenses were engendered. Therefore, the Court, unable to determine the appropriateness of the cost, will not add the $64.08 to the total award.

Thus, Clear Channel's total award, including attorney's fees and expenses is $13,922.80.

2. CVETC

CVETC employed Hunton & Williams which led to billed attorney's fees and expenses totaling $29,885.75. Nine people worked on this case on behalf of CVETC, which is far more than any of the other defendants. Partner Hewitt Pate billed at $235 an hour and expended 35.75 hours. Associate John Martin billed at $165 an hour and worked approximately 122.5 hours. Partner Guy Tripp III billed at $300 an hour and

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3. DeBauche disputes only the copying charge of $161.50 from the U.S. District Court Clerk on January 9, 1998. In defense of the copying, Clear Channel states that it needed a complete record of the case, from DeBauche's Complaint to other defendants' motions and memoranda. The Court finds Clear Channel's justification satisfactory because Clear Channel was added as a defendant after the case had somewhat progressed and, even after Clear Channel became a defendant in November 26, 1997, it was not served all of the pleadings in the case.

worked 5.5 hours.[4] There are also other personnel seeking fees. Stephen Demm billed at $195 an hour and worked .50 hours. Sydney Bear worked at $45 an hour and billed .50 hours. Cyndi Farkas and Christopher Higgins worked together 12.25 hours at $70.00 and $65.00 an hour, respectively. Librarian Ann Long worked .25 hours at $80 an hour, and finally librarian Robert Webster worked at $30 an hour for 1 hour. The grand total of hours equaled approximately 178.25 hours, which is over seventy hours more than the other defendants.

i. Time and Labor Required

The billing records reflect work in the following areas and amounts by the three primary attorneys, Pate, Tripp and Martin: (1) 52.25 hours on research and drafting the dismissal brief; (2) 32.50 hours on the reply brief on the motion to dismiss; (3) 8.75 hours in preparing for and attending oral argument; (4) 7.5 hours in coordinating with defense attorneys; (5) 9.75 hours in researching and drafting the motion for a stay of discovery; (6) 11.00 hours in initial pleading review; and (7) 10.25 hours in "miscellaneous" items, which must include reviewing pleadings and calling the Court about scheduling. In addition, Pate and Martin spent 25.75 hours working on the instant attorney's fees issue.

At the outset, the Court must state that Hunton & Williams overstaffed in this case, which is clearly evidenced by the fact that Clear Channel Radio, which was a private broadcaster in the same position as CVETC, has requested fees for primarily two individuals that did nearly all of its work. The Court notes, however, the fees of five of the individuals (an attorney, two paralegals and two library assistants) amounts to

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4. It appears the firm is not including a fee for Tripp's services.

only $205.00. Therefore, the Court reduces the request by $205.00 for overstaffing and will include in the award only the work performed by the primary attorneys, Pate and Martin, and paralegal, Higgins.

With that said, the Court finds some of the time entries to be unnecessary and duplicative. For example, on December 9, 1997, Pate had a conference with Martin, and they both billed for it.[5] Therefore, the Court subtracts 1 hour from Martin's time. Then, on January 22, 1998, both Pate and Martin met with the other defense counsel in this case at the Attorney's General's Office and both billed for that time. This time, which is inappropriately couched within a list of other items, is duplicative, and the Court will reduce Martin's time by 2.75 hours. Then, on April 14, 1998 Martin bills .25 hours for reviewing this Court's opinion on the motion to dismiss while Pate bills 1.0 hour for the same review. The Court finds this duplicative and reduces Martin's .25 hour time. There are other concerns with the amount of time and labor Hunton & Williams claims to have expended in the case. Martin's listing of .50 hour on December 30, 1998 for scheduling a hearing on the motion to dismiss is excessive. The Court did not hold a 30 minute conversation with Martin and, thus, reduces the time to .10 hour. Then, Martin bills a total of 5.25[6] for preparing for oral

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5. The time entries are also problematic because both Pate and Martin include other work that they did in the case within each entry so that the Court has no way of determining the actual time spent on the conference.

6. CVETC has submitted a Summary of Primary Attorney Time which states that Martin spent 5.25 hours preparing for and attending oral argument on January 26, 1998. In looking at the actual time sheet, the Court sees that only 4.75 hours were

argument on the motion to dismiss while Pate is the attorney that actually gave argument and even billed for his own preparation time. This is redundant. The Court strikes Martin's preparation on January 23 as well as his attendance at the hearing on January 26. Finally, on March 17, 1998, both Martin billed for .25 hour spent on reviewing Wilder's summary judgment brief while Pate billed .75 hours for the same task. This was unnecessary, as CVETC's own motion to dismiss had already been ripe for decision by the time Wilder filed a dispositive brief; it can hardly be said that either Pate or Martin's reading the brief was in necessary preparation for the case. Even after these reductions in time, the Court must still consider 151.35 hours as time billed by Pate and Martin in this case. The Court realizes that 151.35 hours appears excessively high for working on a motion to dismiss, a motion to stay discovery, and the related attorney's fees in this slightly difficult Section 1983 case, particularly in light of the fact that Clear Channel Radio expended nearly 80 billable hours on the case and Wilder expended close to 100 billable hours. However, CVETC filed its motion to dismiss first and its arguments in that motion to dismiss were substantially relied upon by both Clear Channel and Wilder. Therefore, the difference in total time spent on the case partially reflects the fact that CVETC pioneered the state action and First Amendment arguments made in the case as between Clear Channel and Wilder.

Still 151.35 hours amounts to nearly three work weeks of eight-hour days completely devoted to the DeBauche case. The Court determines that this is excessive and hereby reduces

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marked as either preparing for or attending oral argument. As Hunton & Williams knows best whether Martin spent a portion of some other time entry working en the January 26, 1998 hearing, the Court will accept this 5.25 figure as accurate.

the number of hours spent by Martin (which were the bulk of the total at 120.1 hours) by twenty percent, for a final total as between Martin and Pate of 127.33 hours.

ii. Novelty and Difficulty of the Question

CVETC and Clear Channel Radio were in the same position in defending against DeBauche's Complaint. Both merely broadcast the debate and did not participate in the decision to exclude DeBauche from the debate. Both faced First Amendment issues as well as the pivotal question of state action under Section 1983. Therefore, the Court's analysis of this factor for CVETC is the same as it was for Clear Channel.

iii. Skill Required to Perform the Legal Service Properly

Partner Hewitt Pate, a former law clerk on the United States Supreme Court and the Court of Appeals for the Fourth Circuit, has election law experience.[7] Associate John Martin, a former law clerk on the Court of Appeals for the First Circuit and a former attorney for the United States Department of Justice, has federal motions practice experience representing state actors in First Amendment and other constitutional challenges. The Court believes that attorneys Pate and Martin possess the requisite skill for the legal service in this case.

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7. He taught three semesters of election law at the University of Virginia Law School, represented Senator John Warner in a successful effort to enforce Virginia law regarding nomination procedures and successfully defended Manhattan's premiere business improvement district against a "one person, one vote" lawsuit. He has handled numerous other constitutional and civil rights matters.

iv. Customary Fee

In order to show that the requested fees are customary in this market and reasonable for representation of this type, CVETC provides a Declaration by Michael P. McDonald, who is the President of the Center for Individual Rights and typically engages outside counsel from major law firms to provide representation to clients in civil rights litigation. Not only does McDonald note that $235 an hour for Pate and $165 an hour for Martin is reasonable particularly given their level of expertise, he calls the Court's attention to the case Rosenberger v. The Rector and Visitors of the University of Virginia, 1996 WL 537859 (W.D. Va. 1996) (unpublished), where that Court considered one attorney's "distinguished career" as ground to allow an unusually high fee. Id. at *5. As already shown in the Court's analysis of the customary associate fee for Clear Channel Radio, Martin's hourly billing rate falls well within the median range for the Eastern District of Virginia. Pate's range, as well, falls within the median range for medium to high level equity partners.[8]

v. Experience. Reputation and Ability of the Attorneys

As earlier discussed, both Pate and Martin have election law experience and this Court believes that they were capable of handling a Section 1983 suit.

vi. Remaining Johnson Factors

The Court considers the factors as follows. Like Clear Channel, CVETC faced compensatory and punitive damages

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8. The Court assumes that Pate fits within this category of partners based on his background and election law work.

claims, which it was able to avoid by a successful motion to dismiss. The Court notes, however, that CVETC did not prevail on its qualified immunity and mootness arguments. In addition, CVETC has been a long time client of Hunton & Williams, particularly of partner Guy Tripp, and has been charged in a similar fashion to the fee petition presented to this Court. As for whether the attorneys in this case were precluded of other employment due to their acceptance of the case, the Court is of the opinion that the case did not progress far enough to prevent either Pate or Martin from taking on new cases. There is no indication that time constraints were placed on the attorneys by CVETC or that the case should be considered "undesirable" or that it was accepted on a contingent basis.

vii. Determining the Lodestar

Upon consideration of the Johnson factors, above, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of this case:

	Hours	Rate	=	Fee
Hewitt Pate	31.25	$235.00		$7,343.75
John Martin	96.08	$165.00		$15.853.20
TOTAL/Lodestar Figure			(minus	$205.00)

viii. Expenses and Costs

CVETC asks for $90 in costs and $763.75 in fees for the services of paralegal Christopher Higgins, who expended 11.75 hours at a rate of $65 an hour working on the motion to dismiss. The Court concludes that the $90 in costs is reasonable,

as they represent fees for copying pleadings from the Clerk's Office and are lower than other requests before the Court for the same kind of copying. The 11.75 hours billed by Higgins cover cite-checking work and his organization of pleadings, correspondence and legal research for Martin. His hours seem reasonably expended and are specifically unchallenged. Therefore, the Court awards an additional $853.75.

3. Wilder

Wilder has not submitted an analysis under the Johnson factors; therefore, the Court's consideration of his fee application is somewhat constrained. He was represented by the law firm of Wilder & Gregory, which states that the costs incurred in defense of Wilder totaled $12,222.50. Four attorneys worked on Wilder's behalf. Roger Gregory expended 2.5 hours at $115 an hour; Kimberly Friend Smith 26.25 hours at $115 an hour and Lawrence Wilder, Jr. 42.50 hours at $115 an hour. Laura Hillenbrand spent 40.10 hours at $115 an hour and Celestine Woodson spent 10.05 hours at $45 an hour. The Court's analysis under the Johnson factors follows.

i. Time and Labor Rewired

The Court has reviewed defendant Wilder April 23, 1998 fee application and believes that certain items exhibit duplicative billing. On November 21, 1997, both Lawrence Wilder, Jr. and Roger Gregory billed for the time they spent in a strategy conference with each other. The Court finds this inappropriate and will consider only the time claimed by Wilder. Then, again, on November 25, 1997, Kimberly Smith and Lawrence Wilder, Jr. both billed for the same research conference that they had with each other. Therefore, the Court

reduces the request by the total 2.75 hours billed by Smith as she has not differentiated what portion of that amount includes the conference and what portion includes the Section 1983 research. On January 22, 1998, Lawrence Wilder, Jr. and Laura Hillenbrand both billed for meeting with each other and with other defense counsel; the Court will consider only half of their time charged.

Further, the Court believes that the time requested for covering both Lawrence Wilder, Jr. and Laura Hillenbrand's observation of the hearing before this Court on Virginia Commonwealth University and Eugene Trani's motions was unnecessary. Defendant Wilder's attorneys did not make any argument before the Court; therefore the Court strikes the 2.25 hours Laura Hillenbrand claims for preparing for and attending the hearing as well as the 1 hour claimed by Lawrence Wilder, Jr. In addition, the Court believes that the March 3,1998 charge as well as the March 10, 1998 charge concerning Chambers and administrative matters is unmerited; therefore, the Court reduces the billed entries by 10% each.

Finally, the Court is not unmindful of the fact that Wilder's motion to dismiss and motion for summary judgment are mirror images of each other in argument and are nearly verbatim. The Court finds it objectionable that the law firm make separate billings for work on the motions. Consequently, the Court believes the following hours are unnecessary time and labor: Hillenbrand's March 12, 1998 1.8 hours on the motion for summary judgment, March 13, 1998 .6 hours on the motion for summary judgment, March 13,1998 .2 hours on the motion for summary judgment.

ii. The Remaining Johnson Factors

The Court does not have affidavits describing the four attorneys' expertise in order to factor in a number of the Johnson factors, such as whether they possessed the skill requisite to perform the legal services properly, whether representing Wilder precluded any of the attorneys from other employment, and what the nature and length of the professional relationship with Wilder has been. The Court also cannot ascertain whether Wilder placed any time restraints on the firm. As a result, these factors cannot be interpreted in a light that would favor Wilder's fee application. From the other fee applications before the Court, however, the Court can ascertain the customary fee. All of Wilder's attorneys billed at $115 an hour, which is slightly lower than the median range presented to the Court for mid to high level associates and lower than the other associate fees in this case. Therefore, it is not unreasonable. The Court can also state that Wilder has obtained successful results in the same regard as Clear Channel and CVETC and that there is no indication that this kind of case would be considered undesirable.

However, there is one other consideration that the Court must address. DeBauche believes that Wilder's request should be denied in its entirety. She points out that the bill is not directed to Wilder, but to "Commonwealth of Virginia, Division of Risk Management. " Yet this Court believes that it is irrelevant that the "Division of Risk Management" has been billed for the firm's representation of Wilder. This Court has granted the attorney's fee to Wilder in payment to Wilder & Gregory. Wilder & Gregory, in turn, has the responsibility to reimburse Risk Management and the taxpayers for any payments made.

iii. Determining the Lodestar

Upon due consideration, the Court has concluded that the following are reasonable rates for each of the attorneys contributing to the work product of the case:

	Hours	Rate =	Fee
Roger Gregory, Jr.	1.5	$115.00	$172.50
Lawrence Wilder, Jr.	41.3	$115.00	$4,749.50
KimberlyFriendSmith	23.5	$115.00	$2,702.50
Laura Hillenbrand	21.85	$115.00	$2,512.75
TOTAL/Lodestar Figure:			$10,137.25

iv. Expenses and Costs

Wilder also asks for $28.70 in costs incurred in the printing and copying of his motion to dismiss as well as litigation expenses stemming from Celestine Woodson's filing, copying and secretarial work in assisting the attorneys listed above. Woodson billed at $45 an hour for 10.05 hours worked. Finding these costs and expenses to be reasonable, the Court adds $452.25 and $28.70 to the award.

4. Clear Channel and CVETC's Motions for Attorney's Fees and Costs under 28 U.S.C. 6 1927

Section 1927, Title 28 states that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Section 1927 requires a finding that counsel acted in bad faith as a precondition to the imposition of fees. See Brubaker v. City of Richmond, 942 F.2d 1363, 1382-83, n. 25 (4th Cir. 1991). To this end, the "unreasonable and intentional pursuit of frivolous positions" by

an attorney is sufficient to support a finding of the bad faith necessary for the imposition of fees under 28 U.S.C. § 1927. See Mason v. Riddick, Criminal Case Number 3:97CV266 at p. 3 (E.D. Va. August 11, 1997).

In the Section 1927 motions, Clear Channel and CVETC claim that DeBauche's attorneys acted in bad faith by signing and filing the Amended Complaint with frivolous claims against private station defendant, which were not state actors as required for a Section 1983 suit, and by refusing to dismiss those private defendants after it became clear DeBauche had no case. In turn, DeBauche opposes this motion because she claims that her attorneys did not bring the suit in bad faith or vexatiously multiply or prolong the litigation, as the record suggested to the attorneys that the defendants jointly sponsored the Debate. They genuinely believed that Free Speech law supported the claims.

Yet, as described in the Court's April 13, 1998 Memorandum Opinion, from the very beginning it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University in order to show they were exhibiting state action. It was clear from-the beginning that Wilder alone made the decision to exclude her from Debate Virginia and that the private defendants and the University were not in some collaboration about that Wilder decision. While the case may have made for an interesting analysis of timely First Amendment issues if it had survived the motions to dismiss, DeBauche's attorneys chose to overlook the one essential element of their multi-private defendant lawsuit, that is, that there must be state action in the first place. Theirs was an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927, particularly in light of DeBauche's financial situation and

the Court's question as to how her lawsuit has been funded. Consequently, the Court holds DeBauche's attorneys jointly and severally liable for the fee awards.

III. Conclusion

In short, the Court awards attorney's fees and costs in the following amounts: (1) to Clear Channel Radio, $13,922.80; (2) to CVETC, $23,935.70; and (3) to Wilder, $10,618.20.

An appropriate Order shall issue.

JAMES R. SPENCER
UNITED STATES DISTRICT JUDGE

SEP 4 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SUE HARRIS DEBAUCHE

Plaintiff,

v. Civil Action
Number 3:97CV770

VIRGINIA COMMONWEALTH
UNIVERSITY, et. al.

Defendants.

FINAL ORDER

THIS MATTER is before the Court to determine the reasonableness of attorney's fees requested under 42 U.S.C. § 1988 by defendants Clear Channel Radio t/a WRVA, Central Virginia Educational Telecommunications, Inc. ("CVETC") t/a WNVT, and L. Douglas Wilder ("Wilder"). Also before the Court are motions by Clear Channel Radio and CVETC for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

For the reasons stated in the accompanying Memorandum Opinion, the Court hereby GRANTS defendants' requests, but alters the amount of fees. The Court also GRANTS Clear Channel Radio and CVETC's motions for attorney's fees and costs pursuant to 28 U.S.C. § 1927.

Therefore, Plaintiff Sue Harris DeBauche ("DeBauche") is DIRECTED to pay the following firms in these amounts:

(1) To Mays & Valentine, LLP (on behalf of Clear Channel Radio)

Fees:	$13,733.50
Costs:	$189.30
Total:	**$13,922.80**

DeBauche and her counsel of record are jointly and severally liable for the $13,922.80.

(2) To Hunton & Williams (on behalf of CVETC)

Fees:	$23,845.70
Costs:	$90.00
Total:	**$23,935.70**

DeBauche and her counsel of record are jointly and severally liable for the $23,935.70.

(3) To Wilder & Gregory (on behalf of defendant Wilder)

Fees:	$10,589.50
Costs:	$28.70
Total:	**$10,618.20**

DeBauche is solely liable for the $10,618.20.

The case is DISMISSED.

Let the Clerk send a copy of this Order to all parties of record.

It is SO ORDERED.

JAMES R. SPENCER
UNITE STATES DISTRICT JUDGE

SEP 4 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

SUE HARRIS DEBAUCHE 3809 Dillon's Fork Road Fieldale, Virginia 24089, **Plaintiff,**	)
v.	)**Civil action**)**No. 3:97CV770**
VIRGINIA COMMONWEALTH UNIVERSITY, a corporation established pursuant to Virginia Code §23-50.4 and an instrumentality of the Commonwealth of Virginia, c/o Jay M. Weinberg, Esquire Chairman, Board of Visitors 701 East Byrd Street Richmond, Virginia 23218, and **EUGENE P. TRANI**, individually and in his official capacity as President of Virginia Commonwealth University, 910 West Franklin Street Richmond, Virginia 23284, **L. DOUGLAS WILDER**, in his	)

individual capacity,)
)
c/o WRVA-AM Radio)
200 North 22nd Street)
Richmond, Virginia 23223,)
)
)
CLEAR CHANNEL RADIO, INC.,)
t/a WRVA, a Nevada corporation)
)
c/o Edward R. Parker, Reg. Agent)
5511 Staples Mill Road)
Richmond, Virginia 23228,)
)
and)
)
)
CENTRAL VIRGINIA EDU-)
CAIONAL)
TELECOMMUNICATIONS, INC.)
t/a WNVT, a Virginia corporation)
c/o Evans R. Brasfield, Reg. Agent)
951 E. Byrd Street)
Richmond, Virginia 23219)
)
Defendants.)

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND INJUNCTIVE RELIEF[9]

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[9] **This amended complaint is filed as of right under Rule 15(a), as set forth in the notice of filing. Amendments are highlighted by double underlining and/or stricken, as the case may be.**

STATEMENT OF THE CASE

1. This case raises critical issues under the Free Speech and Equal Protection Clauses presented in the case of Forbes v. Arkansas Educational Television Commission, 93 F.2d 497 (8th Cir. 1996), submitted after oral argument before the United States Supreme Court on October 8, 1997, in the case styled Arkansas Educational Television Commission v. Forbes, No. 96-779, concerning the dedication of state forums and resources for the benefit of some candidates for public office to the exclusion of others.

2. This case seeks a declaratory judgment, damages and injunctive relief for unlawful viewpoint discrimination and electoral gerrymandering in the 1997 Virginia Gubernatorial race**, and future statewide races,** through the commitment of substantial resources of the Commonwealth of Virginia for the benefit of the Republican and Democratic candidates for Governor, to the exclusion of the Gubernatorial candidate of the Virginia Reform Party **(the "Party")**, the Virginia affiliate of The Reform Party. The dispute is over the defendants' exclusion of Sue Harris DeBauche ("Ms. DeBauche"), the state-qualified and -balloted Virginia Reform Party candidate for Governor, from "Debate Virginia, the 1997 Virginia Gubernatorial Debate" ("Debate Virginia"), which was **co-sponsored,** planned, promoted, managed, executed and paid for by **WRVA, WNVT and affiliates and** Virginia Commonwealth University, an instrumentality of the Commonwealth of Virginia, on Monday, October 6, 1997, at the VCU Performing Arts Center in Richmond. **The defendants will not permit Ms. DeBauche or other statewide Party candidates to participate in any future Gubernatorial or statewide office**

debate sponsored, co-sponsored, planned, promoted, managed and/or executed by VCU, WRVA, and/or WNVT and affiliates, either now or in the future. All of the defendants will either individually or jointly sponsor, plan, promote manage or hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited.

3. Ms. DeBauche challenges the constitutional validity of the defendants' exclusion of Ms. DeBauche **or future Party candidates** from the public forum opened by VCU **or the other defendants** to the other two state-qualified and -balloted candidates for Governor **or other statewide positions**, the defendants' imposition of a prior restraint on speech at Debate Virginia, their exercise of unlawful content and viewpoint discrimination and, by their exclusion of Ms. DeBauche from Debate Virginia, their conferring state endorsement and special benefits upon the other two candidates, including public statements of preference and substantial financial assistance, thereby unlawfully and irreparably skewing and gerrymandering the outcome of the 1997 Virginia Gubernatorial Election**, and future elections**.

I.
JURISDICTION AND VENUE

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331 and 1343, 28 U.S.C. § 2201 and 2202, the First, Ninth and Fourteenth Amendments to the Constitution of the United States and the doctrine of pendant jurisdiction. This action arises under the Constitution and laws of the United States, including the Civil Rights Act of 1871, 42 U.S.C. § 1983. Ms. DeBauche's claim arose in this judicial district and

venue lies in this district pursuant to 28 U.S.C. §1391(b)(1), (2) or (3).

II.

PARTIES

Plaintiff DeBauche

5. The plaintiff, Ms. DeBauche, is a citizen of the United States and a resident of the Commonwealth of Virginia. She is a taxpayer, a registered voter, a business consultant and owner and operator of several small businesses in Fieldale, Virginia, and a current candidate for Governor of Virginia.

6. Ms. DeBauche is the duly qualified and balloted Virginia Reform Party candidate for Governor of Virginia running in the 1997 Virginia Gubernatorial Election. She is also the State Chairman of the ~~[Virginia Reform]~~ Party. Ms. DeBauche intends to seek public office in the future and expects to run as a candidate for statewide office on the Virginia Reform Party ticket**, including the office of Governor,** in future primaries or general elections in the Commonwealth of Virginia and intends to participate in public forums where duly qualified candidates will contemporaneously and spontaneously debate and express their views on issues relating to the campaigns. **Other members of the Party will also do so in future elections.**

6a. Plaintiff brings this action on behalf of herself and the individual members of that political Party and on behalf of the Party, of which she is Chairman, a political organization.

6b. The candidate for the Presidency of the Party

in the 1992 election won approximately 13.6% of the statewide vote, and in 1996, approximately 6% of the statewide vote. The Party is an agent which is obligated to legally protect the rights of its constituent members.

6c. Plaintiff and the members of her Party have suffered injury in fact, both to her 1997 political campaign in that as a result of the defendants' actions, which affected the results of that election, the Party and its members who seek to run for statewide office will no longer automatically be entitled to a place on the ballot in Virginia elections, organizational activities are threatened and have been adversely affected by the defendants and the Party's ability to attract and to retain members has also been seriously compromised.

6d. Since plaintiff has herself suffered direct injury from the challenged actions, prudential considerations permit her to advance the interests of the Party and its members. Hereinafter, references to plaintiff include the named plaintiff and also by incorporation the Party and its individual members.

Defendant Board of Visitors of Virginia Commonwealth University

7. The defendant Virginia Commonwealth University is a corporation consisting of the Board of Visitors of Virginia Commonwealth University established pursuant to Section 23-50.4 of the Code of Virginia of 1950, as amended (the "Code"), and an instrumentality of the Commonwealth of Virginia. By statute, the corporation "shall be at all times under the control of the General Assembly of Virginia." Virginia Code §23-50.4. The Board of Visitors of Virginia Commonwealth University is responsible for the direction of the affairs and

business of the corporation, the promulgation of policies, rules and regulations pursuant to which VCU operates, and the appointment and direction of the defendant Eugene P. Trani as its President. The Board of Visitors is appointed by the Governor of Virginia, subject to confirmation by the General Assembly of Virginia. (The corporate defendant Virginia Commonwealth University is referred to in this Complaint as the "defendant VCU" and its Board of Visitors as the "Board of Visitors.")

Defendant Trani

8. The defendant, Eugene P. Trani ("Trani"), is a citizen of the Commonwealth of Virginia and the President of VCU. He is the chief executive officer of VCU and implements the policies and rules and regulations of the Board of Visitors of VCU. He is appointed by and subject to the direction and supervision of the Board of Visitors. He is sued in his individual capacity and in his official capacity as President of VCU.

Defendant Wilder

9. The defendant, L. Douglas Wilder ("Wilder"), is a citizen of the Commonwealth of Virginia and a former Democratic Governor of Virginia. He is now employed as a radio talk show host on WRVA-AM Radio. He served as convener and moderator of Debate Virginia and is sued in his individual capacity.

The Private Corporate Defendants

9a. Defendant Clear Channel Radio, Inc., a Nevada corporation, is the owner of WRVA Radio and is qualified to do business in Virginia. Its registered agent is Edward R. Parker. At all times relevant hereto it has either been a

state actor or a private person who is jointly engaged with state officials in the challenged actions, and with them or alone is acting under color of law.

9b. Defendant Central Virginia Educational Telecommunications Corporation, a Virginia corporation, is the owner of WNVT and is qualified to do business in Virginia. Its registered agent is Evans R. Brasfield. At all times relevant hereto it has either been a state actor or a private person who is jointly engaged with state officials in the challenged actions, and with them or alone is acting under color of law.

III.

THE CLAIM

The Statutory Scheme and Ms. DeBauche's Qualification as a Candidate for Governor

10. Chapter 5 of Title 24.2 of the Code sets out the requirements for candidates for public office in the Commonwealth of Virginia.

11. Section 24.2-500 of the Code requires that all persons who wish to qualify as candidates for public office in Virginia must be qualified to vote and hold that office. As a precondition for holding office, the person must be a resident of the Commonwealth for one year next preceding the election and be qualified to vote for the office in question.

12. Sections 24.2-501 and -502 of the Code set forth requirements for candidates for statewide office, including the office of Governor of Virginia, and require the filing by

candidates of a written statement of qualification and economic interests under oath attesting to certain facts related to candidacy.

13. Under Section 24.2-503 of the Code, the deadline for qualifying as a candidate in a general election is the second Tuesday in June.

14. Under Section 24.2-504 of the Code, only a person fulfilling all requirements of a candidate shall have his or her name printed on the election ballot.

15. Under Sections 24.2-509, -510 and -511 of the Code, procedures are established for the nomination of candidates by political parties and the certification of political party candidate nominees to the State Electoral Board.

16. Under Sections 24.2-539 and 541 of the Code, whenever a candidate withdraws as the party candidate, the political party may nominate a person to fill the vacancy in accordance with the party's rules and the name of the newly nominated candidate shall be printed on the ballot if it is known at least forty-five days before the general election.

17. On or about June 7, 1997, the Virginia Reform Party of Virginia selected Mamie Moore of Richmond as its Gubernatorial candidate at its State Convention, but in late June, 1997, Ms. Moore was forced to withdraw as a candidate due to family illness.

18. At an August 15, 1997, meeting of the Virginia Reform Party's State Central Committee held to select a candidate, the Committee voted to defer consideration of a substitute candidate until its September meeting because

Committee members had reason to believe that the defendant Wilder would consider running on the Virginia Reform Party ticket.

19. At a meeting of the Virginia Reform Party State Central Committee on September 14, 1997, the Vice-Chairman of the Party reported that he had personally spoken with the defendant Wilder about running as the Virginia Reform Party candidate and that Wilder indicated that he had no interest in the proposal. Thereafter, Ms. DeBauche was elected by the Central Committee to serve as its Gubernatorial standard bearer.

20. Ms. DeBauche duly qualified with the State Board of Elections as a candidate for the Office of Governor of Virginia on the Virginia Reform Party ticket on or about September 15, 1997, a few days after the defendant VCU accepted responsibility for promoting, managing and hosting Debate Virginia and three weeks before Debate Virginia was held.

The Rules and Regulations of VCU

21. VCU is a public university with two campuses, one situated in the Historic Fan District of the City of Richmond where Debate Virginia was held.

22. The Mission Statement of VCU states that VCU "provides a fertile and stimulating environment for learning, teaching, research, creative expression and public service." It also declares that VCU "serves the local, state, national and international communities through its scholarly activities, its diverse educational programs and its public services activities."

23. The Goals of VCU in carrying out its Mission

Statement include the following:

- Foster a scholarly climate that inspires creativity, a free and open exchange of ideas, critical thinking, intellectual curiosity, freedom of expression and intellectual integrity;

- Use the urban environment as a laboratory for studying and developing new approaches to problems pertaining to the public and private sectors;

- Develop innovative programs for continuing education that establish permanent intellectual connections between the university and its constituents, enhance professional competence, and promote dialogue on public issues;

- Mobilize its creative energies to meet the needs of society and individuals in its unique role as Virginia's major urban university.

24. The Rules and Procedures of VCU adopted by its Board of Visitors provides, in part that:
The University is committed to providing an environment conducive to academic freedom, free inquiry, and equal access to education and occupational opportunities. The principle of academic freedom requires all persons to respect another's dignity, to acknowledge another's right to express differing opinions, to cultivate and to cherish intellectual honesty, and to promote freedom of inquiry and expression. It is therefore the policy of the University that no act of any member of the University community shall serve to restrain or inhibit access to opportunities or the exercise of these freedoms.

Debate Virginia

24a. On July 7, 1997 defendant Wilder confirmed in

writing that negotiations were concluded relative to Debate Virginia and that it would be "jointly sponsored by WRVA, WNVT and affiliates and VCU."

25. **On or about April** ~~[25. On or about August]~~ 1997, Defendant Wilder, a radio talk show host on WRVA-AM radio, issued **formal** invitations to the Republican Gubernatorial nominee, James S. Gilmore, III, and the Democratic nominee, Donald S. Beyer, Jr., to join in a radio debate in which each could address the issues and their records.

26. In August 1997, defendant Wilder knew that the Virginia Reform Party had nominated a candidate, that the Virginia Reform Party candidate had withdrawn from the race and that the Party would be nominating a qualified substitute candidate for the office of Governor on or about mid-September.

27. At some time between the time that Wilder issued the call and invitation to debate, defendants VCU and/or Trani and/or their agents offered the premises of VCU as a forum to hold the debate and offered to contribute VCU personnel, staff and other resources to plan, promote, manage and execute the debate.

28. Wilder accepted the VCU offer on or about September 10, 1997, and from that date, **all** the defendants, **including but not limited to** VCU, and/or Trani and/or his agents, including without limitation staff members of VCU and its Center for Public Policy, ~~[and the defendant Wilder,]~~ took active steps to **sponsor,** plan, promote, manage, and execute "Debate Virginia," including without limitation, undertaking the following:

-- providing VCU personnel and all of the manpower necessary

to plan, promote, manage and execute Debate Virginia, including crews to assemble and disassemble facilities before and after the debate.

-- providing the forum for the debate at the VCU Performing Arts Center,

-- launching a 1-800 toll-free telephone number for debate questions manned and answered by VCU personnel and/or VCU's agents,

-- creating and maintaining a Worldwide Web page on the VCU world-wide web server which included pictures promoting the two candidates, a summary promoting the two candidates positions on the issues and links to Worldwide Wed pages promoting the candidates and their views,

-- creating and using the theme "Debate Virginia" for the event which was used with visual uniformly in everything from the Web Page to the stage backdrop to the Debate Virginia programs,

-- designing a distinctive logo for the debate which included the display of the two symbols for the Republican and Democratic Parties (an elephant and a donkey) and the words "The 1997 Virginia Gubernatorial Debate [star] DEBATE VIRGINIA [star] Virginia Commonwealth University",

-- coordinating press coverage and credentialing for the debate,

-- issuing press releases with information on the debate,

-- managing all of the logistical support to implement Debate Virginia, including arranging security, check-in, tickets, seating,

sound system, lighting, stage set-up and parking, and coordinating the event with the campaign staffs of Messrs. Gilmore and Beyer, and

-- providing all of the facilities and equipment necessary for the event, including space for a pre-debate reception at the University Student Commons, media rooms, candidate workrooms, television monitors, banks of telephones, facsimile machines, computer hookups, connection boxes for broadcast access to the pool feed, pool video and audio feeds of the debate to the media, tables, chairs, podiums, banners, an emergency generator, and tents.

29. As expressed in the words of the defendant Wilder, the forum constituting the debate was designed by the defendants for broadly inclusive purposes to reach all Virginia voters: This truly will be a debate where the residents of Virginia will get to ask the questions that they want these candidates to answer. . . . As we have planned for this debate, we have searched for ways for people from every corner of Virginia to easily put their questions on the table for these two candidates. . . .I encourage Virginians to take advantage of our Web Site and 1-800 number to get their voices heard.

. . . .

A democracy needs to engage everyone in the political process, and we have taken this responsibility to heart in developing a debate format that relies on citizen involvement for its success (emphasis supplied).

30. Upon information and belief, defendant Wilder promoted Debate Virginia on his weekly radio talk show on WRVA-AM, Richmond. **Both the private corporate**

defendants promoted the debate over the airways.

31. Prior to the debate, defendant Wilder stated his opinion that Messrs. Gilmore and Beyer "hadn't succeeded in getting their messages through to the voting public" and therefore announced his intention to inject Virginians into the campaign by soliciting direct questions for them from the people. Wilder declared that

> I'm issuing a true challenge for Virginians to take a greater role in selecting the right individual to lead this state for the next four years. **These questions will shape the debate**, and you'll get direct, unrehearsed answers that will help you decide for whom you will cast your vote (emphasis supplied).

To this end, the defendant VCU established the 1-800 toll-free telephone number and its Worldwide Web site, and took other actions, to solicit such input and to promote Debate Virginia.

32. Before the debate, Professor Robert D. Holsworth, director of the VCU Center for Public Policy, and a panelist for Debate Virginia, stated that the debate was important to both candidates because "it's the first galvanizing event of the campaign."

33. Before the debate, the defendant Wilder indicated that "I might tell people how I would vote" in the Gubernatorial race. The Richmond Times-Dispatch reported that political analysts considered such an endorsement by Wilder as "enough to influence a considerable number of black voters who could hold the key in a close election."

34. Defendant Wilder's pre-debate statements about supporting one or the other of the Republican or Democratic candidates raised additional speculation about which of the two candidates he would support and prompted a telephone call from President William Jefferson Clinton a few hours before Debate Virginia was held (which was reported widely in the press) urging Wilder to endorse the Democratic candidate, Donald S. Beyer, Jr., for Governor.

35. Prior to the debate, the defendant Wilder met privately with the Republican candidate for Governor, James S. Gilmore, III, who is reported to have said: "I'd very much like to have Governor Wilder's support. I think he's got considerable influence."

36. At the beginning of Debate Virginia, the defendant Trani welcomed debate participants to VCU.

37. At the end of the debate, the defendant Wilder thanked the defendant VCU "for providing this forum" and said, "more Virginians heard this debate than any debate, in my judgment, in Virginia's history."

38. The debate was held before an audience of hundreds of invited guests, including prominent Virginians and the leaders of its media interests and was broadcast to most areas of the Commonwealth, including live broadcast over **the defendants** WRVA-AM ~~[radio Richmond,]~~ **and WNVT and** WINA-AM Charlottesville, WJYJ-FM Fredericksburg, WAGE-AM Leesburg, WFIR-AM Roanoke, WDBJ-TV Roanoke, WVEC-TV Norfolk,~~[WNVT-TV Fairfax,]~~ News Channel 8 Springfield, WWBT-TV Richmond, and taped showings aired on WCVE-TV Richmond, WHTJ-TV Charlottesville, WVPT-TV Harrisonburg, WMSY-TV Marion, WHRO-TV Norfolk,

WSBN-TV Norton, and WBRA-TV Roanoke.

The Modern Political Campaign and Limited and Inadequate Channels of Communication

39. Although Ms. DeBauche is the Chairman of the Virginia Reform Party, whose candidate for the Presidency in the 1992 election won approximately ~~[20%]~~ **13.6%** of the statewide vote, **11% in 1994** and in 1996, approximately 6% of the statewide vote, Ms. Debauche has not previously run for political office and her name identification with voters is nominal.

40. James S. Gilmore, III, and Donald S. Beyer, Jr., the Republican and Democratic Party candidates for Governor, have been previously elected to the state-wide offices of Attorney General and Lt. Governor, respectively, and have a high name identification rating with voters.

41. Candidates who have run for, and/or who currently occupy, statewide office, have a built-in advantage to command the attention of "free media," (that is media coverage which is not paid for) and other benefits of office, whereas candidates who have not previously held or run for state-wide office do not share these advantages.

42. One of the traditional and most effective means of achieving identification and getting across a candidate's unique campaign message and viewpoint is the candidate debate.

43. To be successful in communicating Virginia Reform Party ideas and shaping the campaign debate, if not her candidacy, Ms. DeBauche's appearance in debates with other

candidates is an important weapon in realizing the objectives of name identification, issue identification and conveying her unique viewpoint on important issues, as well as persuading voters and the media. There are no similar alternate channels of speech which are available to achieve this goal. Any alternate channel of speech is inadequate for this task.

44. Debate Virginia was a uniquely valuable and important means of communications essential to advance Ms. DeBauche's campaign. Without participation in the debate, Ms. DeBauche could not succeed in her plan to successfully establish name recognition, to affect the candidate focus on the issues, to present her unique viewpoints on the issues and to influence the outcome of the election.

45. In the last two Virginia Presidential elections and the last Virginia Senatorial election, third party and/or independent candidates received approximately 20%, 6% and 11%, respectively, of the statewide vote and significantly influenced the outcome of the elections.

45a. But for the actions of the defendants in gerrymandering the 1997 election results by marginalizing plaintiff and preventing her from raising her name recognition, she would have received at least 15% of the statewide vote in the election.

Ms. DeBauche's Requests to Participate in Debate Virginia

46. Between September 15, 1997 and October 1, 1997, Ms. DeBauche called defendant Wilder at his VCU telephone number identifying herself, leaving a recorded message requesting to participate in Debate Virginia and

requesting that defendant Wilder to return her call. Ms. DeBauche received no response from defendant Wilder.

47. Between September 15, 1997 and October 1, 1997, Ms. DeBauche called defendant Wilder at his personal telephone number identifying herself, leaving a recorded message requesting to participate in Debate Virginia and requesting that defendant Wilder to return her call. Ms. DeBauche received no response from defendant Wilder.

48. Between September 15, 1997 and October 6, 1997, other Central Committee members of the Virginia Reform Party called the defendant Wilder at his VCU telephone number identifying themselves and leaving recorded message requesting that Ms. DeBauche, as the Virginia Reform Party candidate, participate in Debate Virginia and requesting that defendant Wilder to return their calls. The defendant Wilder did not respond to these requests.

49. Between September 15, 1997 and October 6, 1997, Ms. DeBauche and other Central Committee members of the Virginia Reform Party called the VCU 1-800 number established by defendant VCU for Debate Virginia, identifying themselves and leaving recorded message requesting that Ms. DeBauche, as the Virginia Reform Party candidate, participate in Debate Virginia. The defendant Wilder did not respond to these requests.

50. On October 1, 1997, Ms. DeBauche sent an e-mail message to the address shown on the defendant VCU's Debate Virginia Worldwide Web site (www.vcu.edu/debate) identifying herself, indicating that she had repeatedly made calls to the defendant Wilder to be included as a participant in Debate Virginia and requesting once again to participate in Debate

Virginia. None of the defendants responded to her e-mail.

51. On October 6, 1997, Debate Virginia was held as planned with only Messrs. Gilmore and Beyer as participants, excluding Ms. DeBauche from the debate.

51a. On or about October 21, 1997, Ms. DeBauche made a written demand to the defendants VCU and Trani that they schedule a Gubernatorial debate including all three candidates before the November 4, 1997, election to remedy the damage done to MS. DeBauche and her Party and its members, which demand was rejected by the defendants VCU and Trani on or about October 24, 1997.

The Defendants' Policies

52. By policy, custom and/or practice, the **state actor** defendants have adopted an unlawful policy vesting standardless discretion in government officials and non-governmental persons **or entities acting under color of state law** to regulate access to, and expression in, designated public forums involving public service activities like Debate Virginia and to deny precious First Amendment rights and the Equal Protection of the Law based upon personal predilections and whim, and/or have unlawfully permitted such officials and persons **or entities** to make unlawful distinctions based on the content or viewpoint of speech.

53. By policy, custom and/or practice, the **state actor** defendants have unlawfully breached and/or delegated their affirmative constitutional duty to promulgate constitutional regulations for access to, and expression in, designated public forums involving public service activities like Debate Virginia and to deny precious First Amendment rights and the Equal

Protection of the Law by vesting standardless discretion in government officials **and/or nongovernmental persons or entities acting under color of state law** to deny precious First Amendment rights and the Equal Protection of the Law based upon personal predilections and whim, and/or by permitting such officials **and/or persons or entities** to make unlawful distinctions based on the content or viewpoint of speech, impermissibly requiring governmental officials **and/or such persons or entities** to make judgments that they are not otherwise qualified or should be permitted to make in a democratic society.

54. By policy, custom and/or practice, the **state actor** defendants have established a licensing system for access to, and expression in, designated public forums involving public service activities like Debate Virginia in a manner that constitutes a prior restraint on freedom of speech that, in the absence of narrowly drawn, reasonable and definite standards, and sufficiently adequate and definite procedural safeguards, is constitutionally invalid.

55. By policy, custom and/or practice, the **state actor** defendants have acted unlawfully to deny Ms. DeBauche's rights to Free Speech and Equal Protection of the law by expending substantial state resources to promote the views of selected political candidates, while at the same time excluding such expenditures with reference to other candidate views for the same office, advancing impermissible partisan objectives in the democratic process and invidiously discriminating among the candidates' core political speech which is entitled to the highest degree of protection from government interference and intrusion.

56. The actions of the defendants with respect to Ms.

DeBauches's request for access, participation and expression in Debate Virginia as a candidate for Governor were taken pursuant to the VCU's policies, customs and/or practices and were authorized, sanctioned, implemented, permitted and ratified by the defendants or their agents functioning at a policy making level.

The Public Forum Nature of Debate Virginia

57. Ms. DeBauche's request to participate in Debate Virginia as a candidate for Governor of Virginia is clearly within the confines of protected speech under the First Amendment.

58. The ~~[defendant VCU has]~~ **defendants** intentionally designated Debate Virginia as a designated and/or limited public forum.

59. The defendants have in practice permitted the other two state-qualified candidates for Governor, Messrs. Gilmore and Beyer, to participate in Debate Virginia and have used extensive **private and** taxpayer-financed state resources in support of their appearances in Debate Virginia.

60. Ms. DeBauche's participation in Debate Virginia would have been compatible with the uses of the Debate Virginia forum and the nature of the property comprising Debate Virginia is compatible with such expressive activity.

61. The message and the various media constituting the entirety of Debate Virginia through which Ms. DeBauche sought to communicate her message was and is unique and, in the exclusion of candidate DeBauche from that forum, alternate methods were and are otherwise inadequate and unavailable for communicating her message to the general public.

62. The defendants have unlawfully excluded Ms. DeBauche from presenting her viewpoints on important 1997 election issues in Debate Virginia based on content or viewpoint while permitting and affirmatively assisting Messrs. Gilmore and Beyer to present their viewpoints freely without regard to content or viewpoint. **They will do so in future elections to favor other majority party candidates to the detriment of the candidates of the Party.**

63. Having opened Debate Virginia as a public forum in which duly qualified candidate for Governor of Virginia express their views or comments through spontaneous answers to questions posed to each candidate for that office, the defendants and their agents have discriminated against Ms. DeBauche, and censored protected speech on the basis of the content and/or viewpoint of her speech.

64. Even if Debate Virginia was deemed to be a non-public forum, the defendants and their agents nevertheless have discriminated against Ms. DeBauche without a reasonable basis and have unlawfully discriminated against her
based on her viewpoint and/or otherwise have adopted a policy that is vague and overbroad and contains no definite standards to guide determinations as to permitted speech or otherwise to limit the abuse of official discretion.

Collateral Allegations

65. The defendants and their agents, under color of law and of the policies, customs and practices of defendant VCU have arbitrarily and capriciously discriminated against Ms. DeBauche and her ideas, concepts and viewpoints, in violation of her rights to free speech and equal protection of the law guaranteed by the First and Fourteenth Amendments to the United States Constitution.

66. The willful and wanton actions of the defendants indicate a reckless or callous disregard of, or deliberate indifference to, the rights of others as to constitute gross negligence.

67. The actions of the defendants violate clearly established constitutional rights of which a reasonable person would have known and constitute an abuse of government power.

68. The actions of the defendants in enforcing the policies and rules and regulations of VCU were done either with the active participation, knowledge and/or acquiescence of the defendants, or otherwise in breach of their duty to be aware of all actions taken in connection with the enforcement of said policy and regulations.

69. ~~[Upon information and belief,]~~ **The** defendants will not permit Ms. DeBauche or ~~[others similarly situated persons]~~ **other statewide Party candidates** to participate in any future Gubernatorial ~~[debate]~~ **or statewide office debates sponsored, co-sponsored,** planned, promoted, managed and/or executed by **either WRVA, WNVT and affiliates or** VCU, either now or in the future. **All the defendants will either individually or jointly sponsor, plan, promote manage or hold statewide debates in the future from which candidates of the Party will be excluded and to which only Democratic and Republican candidates will be invited.**

70. As written and as applied, the defendants' policies, customs and/or practices violate Ms. DeBauche's right to free speech under the First Amendment and her right under the Equal Protection Clause of the Fourteenth Amendment, which are entitled to the fullest measure of constitutional

protection.

71. As written and as applied, the defendants' policies, customs and/or practices favor the speech of candidates of the major political parties over speech of candidates from minority political parties and thereby invert cherished First Amendment values promoting dissent, an open electoral process, and free and uninhibited public debate of political questions.

72. As written and as applied, the defendants' policies, customs and/or practices are unconstitutionally vague and overbroad in that they do not properly inform duly qualified candidates why access to Debate Virginia and similar events is restricted and/or prohibited, impermissibly allowing the defendants to impose their own predilections in determining what speech is permissible and inhibit the exercise of First Amendment rights.

73. As written and as applied, the defendants' policies, customs and/or practices engage in impermissible content discrimination among different forms of social, economic, philosophical and political speech.

74. As written and applied, the defendants' policies, customs and/or practices deny free speech in a designated First Amendment forum.

75. As written and as applied, the defendants' policies, customs and/or practices do not further any important, substantial or compelling governmental interests.

76. As written and as applied, the restrictions imposed by the defendants' policies, customs and/or practices

are greater than necessary to further any governmental interest asserted.

77. As written and as applied, the primary effect of defendants' policies, customs and/or practices is to inhibit certain forms of political speech.

78. As written and as applied, the defendants' policies, customs and/or practices constitute an unlawful prior restraint on speech.

79. The aforesaid actions of the defendants were intentional, were taken in bad faith and under color of State law at a time when they knew or should have known that their actions would deprive Ms. DeBauche **and members** of her **Party of their** settled legal rights.

80. The aforesaid actions of the defendants were authorized, sanctioned, implemented and ratified by officials functioning at a policy making level.

81. The constitutional deprivations herein are "fairly attributable" to the state.

82. The defendant Wilder **and the private corporate defendants** may fairly be said to be ~~[a]~~ state ~~[actor]~~ **actors** because ~~[he]~~ **they** worked jointly on Debate Virginia with the defendants VCU and Trani and/or their respective agents and received significant aid and assistance from the defendant VCU as an instrumentality of the Commonwealth of Virginia in the execution of Debate Virginia~~[, the defendant Wilder's]~~. **Their** conduct is otherwise attributable to the defendant VCU.

83. The defendant Wilder ~~[has been a willful participant]~~ **and the private corporate defendants have been willful participants** in joint action with the defendant VCU and/or its agents as state actors and, as ~~[a]~~ private ~~[person, he has]~~ **persons, they have** jointly engaged with state officials in the challenged actions, and with them ~~[he is]~~ **they are** acting under color of law.

84. The defendant Wilder **and the private corporate defendants** acted with the intent to exclude Ms. DeBauche from participation as a candidate in Debate Virginia in that ~~[he]~~ **they** had a subjective appreciation that ~~[his]~~ **their** acts would deprive Ms. DeBauche of her constitutional rights and knew or should have known of the illegality of such actions and that this would deprive her of settled legal rights.

85. As a direct and proximate result of the actions of the Defendants, Ms. DeBauche has suffered compensatory damages and other injury and pecuniary loss and has been denied her constitutional rights.

86. Ms. DeBauche has no plain, adequate or complete remedy at law to redress these wrongs, and this suit for declaratory and injunctive relief is the only means of securing adequate relief. Ms. DeBauche ~~[is]~~ **and the Party and its members are** now suffering and will continue to suffer irreparable injury from defendants' policies, practices, customs and usage as set forth herein until enjoined by the court.

87. As a direct and proximate result of the actions of the defendants, Ms. DeBauche has been denied her constitutional rights.

COUNT I

88. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

89. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to free speech **and freedom of association** as guaranteed by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983.

COUNT II

90. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

91. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to equal protection of the law protected by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983 by unlawfully discriminating on the basis of the content or viewpoint of her speech.

COUNT III

92. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[85]~~ **87**.

93. Upon information and belief, as of the date of Debate Virginia, the Virginia Gubernatorial Election was a virtual dead heat between Messrs. Gilmore and Beyer.

94. Upon information and belief, the defendant Wilder and the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, are sophisticated political analysts and/or operatives who understand the political

and electoral process.

95. Upon information and belief, the defendant Wilder ~~[and]~~, the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, **and the private corporate defendants** are privy to the latest polling data for candidates running for the Office of Governor of Virginia.

96. Upon information and belief, the defendant Wilder has stated his intention to inform voters in the Commonwealth of Virginia what candidate he intends to vote for the Office of Governor of Virginia.

97. Upon information and belief, the defendant Wilder ~~[and]~~, the defendant VCU and/or its agents the Center for Public Policy and Dr. Robert Holsworth, **and the private corporate defendants** were aware that if Ms. DeBauche had been a participant in Debate Virginia, she stood in a better position to reach and persuade more voters to vote for her, and to present her unique viewpoint on the issues, thereby distorting the electoral process and affecting the outcome of the election between the other two candidates.

98. Upon information and belief, the defendant VCU ~~[and Wilder]~~**, Wilder and the private corporate defendants** intentionally excluded Ms. DeBauche from Debate Virginia in order to promote the interests of the Republican and Democratic candidates for Governor and thereby to influence unlawfully the outcome of the election.

99. The aforesaid actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** constitutional rights to equal protection of the law protected by the Fourteenth Amendments of the United States Constitution

and 42 U.S.C. §1983 by unlawfully classifying the duly-qualified and -balloted candidates for Governor of Virginia without a reasonable or compelling state interest and in a manner that failed to satisfy constitutional requirements.

COUNT IV

100. Ms. DeBauche incorporates by reference herein the allegations contained in paragraphs 1 through ~~[97]~~ **99**.

101. The actions of the defendants have violated Ms. DeBauche's**, the Party's and its members'** Constitutional rights protected by the Ninth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. §1983, as well as related provisions found in the United States Constitution.

REQUESTS FOR RELIEF

102. Ms. DeBauche seeks a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. Sections 2201-2202, declaring the acts of the defendants relative to the exclusion of Ms. DeBauche from Debate Virginia a violation of Ms. DeBauche's constitutional rights, awarding Ms. DeBauche nominal, compensatory and punitive damages from the **private corporate defendants and** defendants Trani and Wilder in their individual capacities, and granting a mandatory injunction commanding the defendants, their officers, employees, agents, successors or assigns, etc., to enjoin the defendants' interference with her exercise of her constitutional rights in the future.

103. Ms. DeBauche is entitled to her reasonable attorney's fees and costs.

WHEREFORE PLAINTIFF PRAYS:

1. That the Court declare the acts of the defendants relative to the exclusion of Ms. DeBauche from Debate Virginia a violation of Ms. DeBauche's**, the Party's and its members'** constitutional rights and require the defendants, their officers, agents, servants, employees, attorneys, successors or assigns, and those persons in active concert or participation with them, to honor Ms. DeBauche's First Amendment rights of free speech, and her Ninth and Fourteenth Amendment rights to equal protection of the law and enjoin the defendants' interference with her exercise of those rights.

2. Issue a declaratory judgment declaring the ~~[defendant VCU's]~~ **defendants'** policies, customs and practices and/or action taken pursuant thereto or otherwise, unconstitutional as written and as applied with reference to any future statewide political candidacy of Ms. DeBauche **or any candidate of the Party**.

3. That upon final hearing in this cause, the Court review and consider the results of the election for Governor of the Commonwealth of Virginia and whether other parties should be joined in this action to respond as to whether the results of the election should be invalidated and/or other equitable relief should be granted based upon the undue influence and political partisanship of the ~~[defendant VCU]~~ **defendants** in the electoral process and its effect on the outcome of the election**, including but not limited to declaring that plaintiff would have received 15% of the statewide vote and directing other parties so joined, including without limitation the State Board of Elections, or other appropriate entity to certify candidates selected by the Virginia Reform Party from its membership to be placed on the ballot in the next Virginia gubernatorial election and other appropriate relief**.

4. That upon final hearing in this cause a mandatory injunction issue commanding the defendants, their officers, agents, servants, employees, successors or assigns, to prevent the enforcement of the ~~[defendant VCU's]~~ **defendants'** policies, customs and practices, as written or applied, and/or action taken pursuant thereto or otherwise, from excluding Ms. DeBauche and any other future ~~[political]~~ **Party** candidate from any debate **sponsored, co-sponsored,** planned, promoted, managed and/or executed by **any of** the ~~[defendant VCU]~~ **defendants**.

5. That this Court direct the defendants to instruct all of their subordinate officers, agents, employees, servants and those persons in active concert or participation with them believed to be planning to participate in the activities enumerated above not to engage or participate in any such activities enjoined in paragraphs 1, 3 and 4 above.

6. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche nominal damages.

7. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche compensatory damages.

8. Require the **private corporate defendants and** defendants Trani and Wilder to pay Ms. DeBauche punitive damages.

9. Require the defendants to pay Ms. DeBauche's costs and reasonable attorney's fees.

10. That the court grant such further and general relief as to which Ms. DeBauche may be entitled.

Dated ~~[October 15]~~: **November 26**, 1997.

SUE HARRIS DEBAUCHE

By:_____

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CERTIFICATE OF SERVICE

I, James J. Knicely, Esquire, certify that the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES AND INJUNCTIVE RELIEF was mailed first class, postage prepaid, to Richard Cullen, Attorney General, Office of the Attorney General, Supreme Court Building, 6th & Main Streets, Richmond, Virginia 23219, and to L. Douglas Wilder, c/o WRVA-AM, 200 North 22nd Street, Richmond, Virginia 23223, on this 26th day of November, 1997.

_____

James J. Knicely, Esquire

Supreme Court, U.S.
FILED
991009 DEC 13 1999
OFFICE OF THE CLERK

No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,
Petitioner,

v.

EUGENE TRANI, et al.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX
Volume II of II

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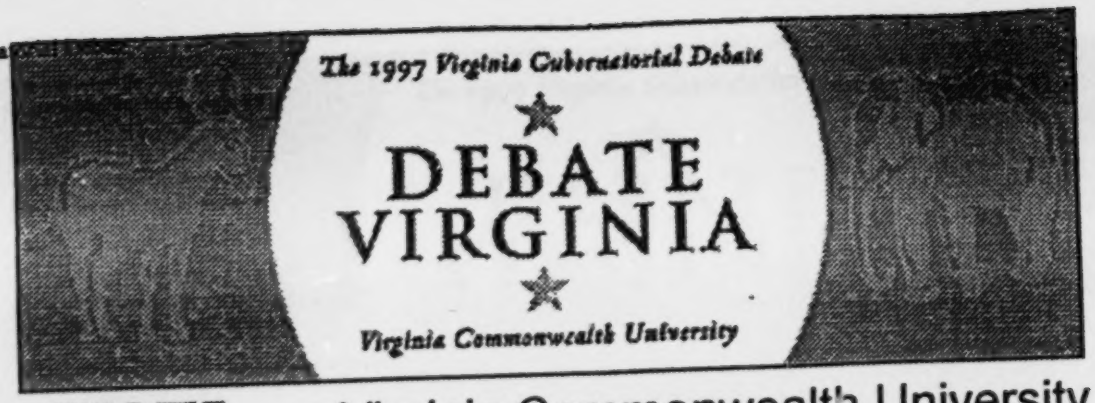

VCU
Virginia Commonwealth University

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Virginia's 1997 Gubernatorial Debate
Monday, October 6, 1997

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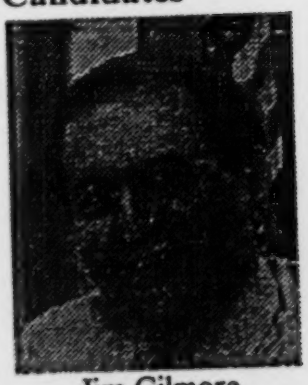

Don Beyer

Jim Gilmore

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Gilmore and Beyer on the Issues
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What's New
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What did you think of the debate?

You've heard from the candidates, now let us hear from you. Submit your comments on the debate here:

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Check out the Commonwealth Poll

See who's leading the race.

L. Douglas Wilder

Info on debate moderator L. Douglas Wilder, VCU Distinguished Professor and former Governor of Virginia, his positions and opinions.

University News Services
debate@vcu.edu
Date Last Modified: Oct 10, 1997

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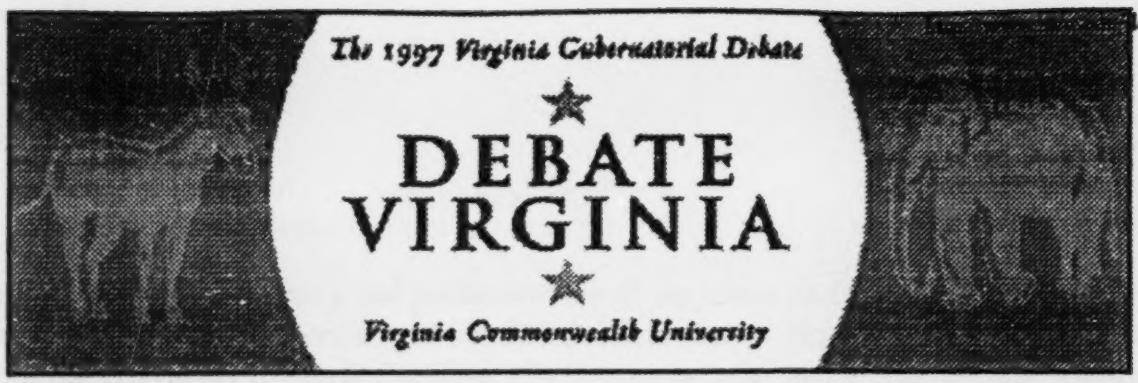
A116



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Press Room

Archived Releases

Check here for the prior news releases:

1. VCU TO HOST 1997 VIRGINIA GUBERNATORIAL DEBATE
2. VCU LAUNCHES 1-800 NUMBER, WEB SITE TO DRAW VIRGINIANS QUESTIONS FOR 1997 GUBERNATORIAL DEBATE
3. OCT. 3 DEADLINE SET FOR MEDIA CREDENTIALS FOR GUBERNATORIAL DEBATE AT VCU
4. OCT. 3 DEADLINE NEARS FOR MEDIA CREDENTIALS FOR DEBATE VIRGINIA AT VCU

University News Services
debate@vcu.edu
Date Last Modified: Oct 7, 1997

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Debate Virginia Website Press Room (p. 45)
A117

FOR IMMEDIATE RELEASE
September 12, 1997
Contact: Melissa Jones (804) 828-6057
Kyra Scarton Newman (804) 828-6052

VCU TO HOST 1997 VIRGINIA GUBERNATORIAL DEBATE

Former Governor Wilder to Serve as Moderator

A118

RICHMOND, Va. -- Virginia Commonwealth University will host an Oct. 6 debate between Virginia's two gubernatorial candidates: Democrat Donald S. Beyer Jr. and Republican James S. Gilmore III. The debate, moderated by former Gov. L. Douglas Wilder, will be broadcast live from 8-10 p.m. from VCU's Performing Arts Center, 922 Park Ave., during Wilder's regular show on WRVA-AM and by Fairfax-based WNVT-TV in conjunction with public-broadcasting colleague WCVE-TV in Richmond.

The debate will include questions from panelists, direct questioning between the two candidates and a component that features questions culled from issues raised by citizens from across Virginia. VCU is launching a 1-800 number and a World Wide Web site for Virginians to use in submitting questions for the debate.

"This truly will be a debate where the residents of Virginia will get to ask the questions that they want these candidates to answer," said Wilder, a distinguished professor at VCU's Center for Public Policy since 1995. As Virginia's 65th governor from 1990-94, Wilder was the nation's first African-American governor, after having made history with his 1985 election as the state's first African-American lieutenant governor.

The Oct. 6 program is the only scheduled debate between Beyer, currently lieutenant governor, and Gilmore, who stepped down as attorney general earlier this year to concentrate on the campaign. With Election Day set for Nov. 4, the Virginia race is one of only two gubernatorial campaigns in the nation this year.

Joining Wilder as panelists will be Robert D. Holsworth, Ph.D., a VCU political scientist and director of the university's Center for Public Policy, and Larry Sabato, Ph.D., a political analyst from the University of Virginia. Both Holsworth and Sabato are quoted regularly in the national media for their insight on state, regional and national political issues.

Wilder already has begun drawing questions from Virginians through announcements on his weekly radio show, which airs on WRVA-AM on Mondays at 8 p.m. To submit their questions, Virginians can call 1-800-375-4010 or send e-mail to debate@vcu.edu.

"As we have planned for this debate, we have searched for ways for people from every corner of Virginia to easily put their questions on the table for these two candidates," Wilder said. "I encourage Virginians to take advantage of our Web site and 1-800 number to get their voices heard."

A VCU faculty member since 1978, Holsworth has directed VCU's Center for Public Policy, an interdisciplinary research, teaching and public-service center, since its founding in 1994. He teaches courses in Virginia politics, American politics and political theory. Holsworth earned his doctoral degree from the University of North Carolina. His honors include the highest teaching awards from both VCU and the State Council of Higher Education for Virginia.

046

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Sabato is the Robert Kent Gooch Professor of Government and Foreign Affairs at the University of Virginia, which he joined in 1978. He is a former Rhodes Scholar and Danforth Fellow. After earning his undergraduate degree from UVa., Sabato did graduate work in public policy at Princeton University's Woodrow Wilson School of Public and International Affairs. He received a Rhodes Scholarship in 1975 to study at Queen's College, Oxford University and a SCHEV outstanding faculty award.

NOTE: All media must be credentialed for the debate as well as parking. Please call Pamela C. Lippincott, of VCU's University News Services, at (804) 828-1231.

# # #

A119

047

FOR IMMEDIATE RELEASE
September 16, 1997
Contact: Kyra Scarton Newman (804) 828-6052
E-mail: knewman@titan.vcu.edu

VCU LAUNCHES 1-800 NUMBER, WEB SITE TO DRAW VIRGINIANS' QUESTIONS FOR 1997 GUBERNATORIAL DEBATE

RICHMOND, Va. - Virginia Commonwealth University has launched a toll-free telephone number and World Wide Web site to draw questions that Virginians want asked during the 1997 debate between Virginia's two gubernatorial candidates. VCU will host the Oct. 6 debate between Democrat Donald S. Beyer Jr. and Republican James S. Gilmore III. Former Virginia Gov. L. Douglas Wilder will serve as moderator.

A120

To submit their questions, Virginians can call 1-800-375-4010. They also can propose questions while visiting the debate Web page at www.vcu.edu/debate/. Since the Web page debuted on Sept. 10 through this morning (Sept. 16), about 500 people have accessed the site, and voters are beginning to forward questions for consideration.

The citizen questions will serve as one component of the debate, currently the only one scheduled between Beyer, the state's lieutenant governor, and Gilmore, the former attorney general who stepped down to concentrate on the campaign. Other portions of the Oct. 6 debate will include questions from panelists and direct questioning between the two candidates.

Wilder stressed that the questions submitted by Virginians will provide a real-world picture of the issues that citizens want their future governor to address. "By asking for comments from citizens across the state, we can have a true discussion that will give Virginians insight about the future leader of Virginia," said Wilder, a distinguished professor at VCU's Center for Public Policy since 1995. "Virginians should embrace this opportunity to put real questions on the table. A democracy needs to engage everyone in the political process, and we have taken this responsibility to heart in developing a debate format that relies on citizen involvement for its success."

The debate will be broadcast live from 8-10 p.m. Oct. 6 from VCU's Performing Arts Center, 922 Park Ave., during Wilder's regular show on WRVA-AM and by Fairfax-based WNVT-TV in conjunction with public-broadcasting colleague WCVE-TV in Richmond.

As Virginia's 65th chief executive from 1990-94, Wilder was the nation's first elected African-American governor. He also made history with his 1985 election as the state's first African-American lieutenant governor.

Joining Wilder as panelists for the debate will be Robert D. Holsworth, Ph.D., a VCU political scientist and director of the university's Center for Public Policy, and Larry Sabato, Ph.D., a political analyst from the University of Virginia.

Wilder already has begun soliciting questions from Virginians through announcements on his weekly radio show, which airs on WRVA-AM on Mondays at 8 p.m.

NOTE: All media must be credentialed for the debate as well as parking. Please call Pamela C. Lippincott, of VCU's University News Services, at (804) 828-1231.

051

October 6, 1997
Contact: Bill Byrd or Brian Matt (804) 828-1231
E-mail:bmatt@saturn.vcu.edu
http://views.vcu.edu/uns/

VIRGINIANS POSE WIDE RANGE OF QUESTIONS FOR BEYER-GILMORE DEBATE AT VCU

RICHMOND, Va. -- As Virginia's 1997 election for governor approaches, Virginians are keenly interested in the major issues raised by the candidates: taxes, education, abortion, crime and the environment.

A121

But citizens also want to know the contenders' positions on many issues given little attention during the campaign or not addressed by the candidates. Voters would like to see the candidates questioned closely on a broad array of controversial topics such as urban sprawl, gay rights, affirmative action, child support enforcement and campaign finance reform.

Those were among the issues raised by citizens who submitted more than 400 questions to Virginia Commonwealth University in advance of tonight's gubernatorial debate. VCU hosted the debate between Democrat Donald S. Beyer Jr. and Republican James S. Gilmore III. For more than three weeks the university accepted questions for the gubernatorial contenders via e-mail and a toll-free telephone number. Inquiries drawn from these messages made up one section of questioning for the candidates at the debate.

Questions were submitted from across the state -- from the coal mining towns of Southwest Virginia to the rural communities of the Eastern Shore, from the densely populated urban areas of Northern Virginia to the tobacco farms of Southside Virginia. Retirees had questions about problems with Social Security and the cost of living. High school government students in Franklin and Floyd counties had inquiries, including one on the candidates' position on a cigarette tax hike to combat teen smoking.

"The thoughtfulness and insightfulness of these questions reveal that Virginians truly care about the future leadership of the Commonwealth, and what it will mean for their families and them," said former Gov. L. Douglas Wilder, now a distinguished professor at VCU's Center for Public Policy. Gov. Wilder moderated tonight's debate, and in advance of it he challenged Virginians to put their questions directly to the two major-party candidates.

Hundreds responded. VCU received more than 250 questions via e-mail from voters who visited the university's Debate Virginia site on the World Wide Web. More than 150 submitted questions through the toll-free number. Respondents had the option of noting their names and localities along with their questions.

"I'm impressed by the volume of questions and by the caliber of knowledge that citizens have about the issues now facing Virginia," Wilder said. "These questioners raised some very real issues -- including many that haven't been fully addressed by the candidates. That will add extraordinary value to this debate."

Many of the questions dealt with taxes, the issue that has emerged as the centerpiece of the campaign. Citizens made inquiries about both Gilmore's plan to abolish the property tax on most cars and trucks and Beyer's proposal to offer income tax credits to many Virginia families.

But others expressed skepticism over the tax cut plans and wondered if any substantial decreases were possible. "You don't get something for nothing," one caller said. "The budget's not going to go down

Some wanted to know the candidates' positions on other tax issues that have not been in the campaign's limelight. "Is there a possibility that the sales tax on food and over-the-counter medicine can be repealed?" one caller asked.

Just as it has been a prime focus of the campaign, education was another leading topic among the respondents. Several citizens sought the candidates' positions on using state lottery profits for public schools. "Every year we get money back in state tax refunds, and it just seems very odd to me that we'd be able to get a refund, yet we don't seem to see any of our lottery money going into our children's education," one questioner said.

Other questioners raised topics that have received relatively little attention from the campaign. Some respondents urged the candidates to take more definite positions on affirmative action and other racial discrimination issues. "I want a definite yes or no (on affirmative action) and the reasons why and how the candidates will pursue it," said one Henrico County voter. "I know it's a federal issue and the state of California has just done away with it (but) I want to know how they feel about it with regard to Virginia." And another caller wanted to know if the candidates would refuse memberships in discriminatory private clubs.

Respondents were concerned about a variety of issues affecting families, including enforcement of court-ordered child support payments. "How will you help the 400,000-plus children in the state that are due child support and not receiving payments," said one Danville resident.

Others wanted to know the candidates' position on homosexuals' rights. "The gay civil rights movement is hard to ignore and may soon be a Virginia issue. What are your policies concerning gay/lesbian rights, and how do you see those translating into policy?" one questioner said.

Other respondents wondered just how much either candidate knew about the concerns of average voters. One wanted to know if either could cite the price of a dozen eggs or a gallon of milk.

"In addition to specific questions, we were able to use broad themes from our inquiries," said Robert D. Holsworth, a VCU political scientist who was one of the panelists in tonight's debate. "Many of the questions were similar; therefore, we were able to take the essence of these questions and combine them." Holsworth is director of the university's Center for Public Policy.

Voters can continue to submit comments on the debate or the campaign by calling 1-800-375-4010 or by accessing VCU's Web site at http://www.vcu.edu/debate. E-mail can be sent directly to debate@vcu.edu.

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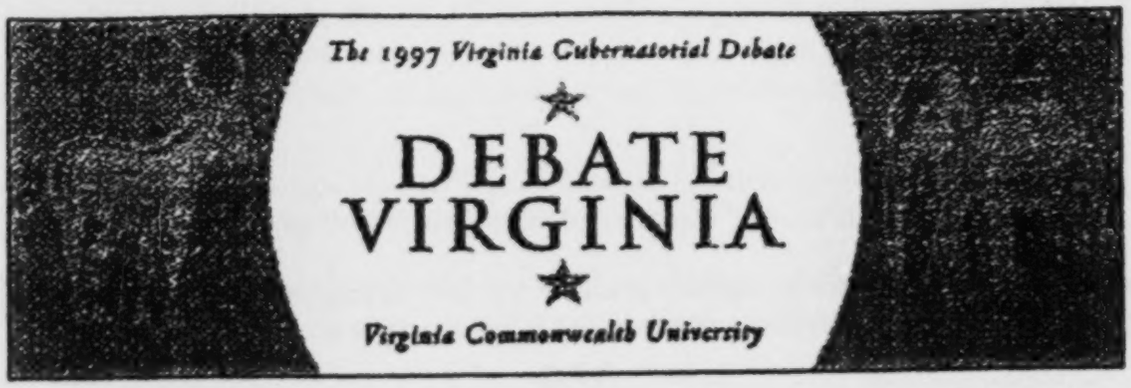

A123

University News Services

Debate Virginia '97 Reflects Teamwork Across University

Five thousand feet of coaxial cable. Ninety reporters and photographers. An organ and a harpsichord occupying space needed by deadline-pressured media. Ten satellite and microwave trucks. Five hundred guests sharing a building with a rehearsal for "The Three Musketeers."

The possibilities for problems were numerous. Yet Debate Virginia went smoothly at Virginia Commonwealth University's Performing Arts Center on Oct. 6, thanks to weeks of planning, hard work and patience. From the pre-debate reception at the University Student Commons to impromptu post-debate news conferences on the center's stage, the event went smoothly, drawing praise from campaign staffers, guests and even reporters.

At the conclusion of the event, moderator L. Douglas Wilder thanked VCU "for providing this forum. More Virginians heard this debate than any debate, in my judgment, in Virginia's history."

The former governor said he hoped the event would help convince people to vote. "Don't believe that you can't make a difference. Because you can. And accordingly, go out and vote."

Weeks of Planning

Planning for the debate was spearheaded by VCU's Center for Public Policy and Wilder, now a distinguished professor with the center. In addition to serving as moderator of the debate, Wilder is also credited with convening Debate Virginia; earlier this year he invited both candidates to appear on his Monday night radio show to foster a dialogue between the contenders and voters.

Administrators and staff members from across the university, including leadership from the Office of the President, managed the daily execution of the event.

Details covered everything from the sound system to parking, from tickets and a student lottery to coordinating the debate format with the two campaigns. The entire event was coordinated under the theme of Debate Virginia, which was carried through visually in everything from the stage backdrop to the programs.

Media Coverage

Almost 90 journalists, representing everything from the one of the nation's largest magazines to university radio news operations, attended the event.

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From early interviews with Gov. L. Douglas Wilder and live segments with panelist Robert D. Holsworth for newscasts that began as early as 4 p.m., television news crews from around the state and Washington, D.C., parked almost a dozen satellite and microwave trucks bumper-to-bumper in front of the debate venue.

Another flash of lights lit up the Performing Arts Center after the debate, as television reporters delivered live coverage for their late broadcasts, including a few with reports directly from the stage just moments after Wilder signed off on the debate.

Print and radio journalists crowded the second-floor media rooms. Most wrote their stories on portable computers while watching television monitors; a smaller number viewed the proceedings from the nearby auditorium.

A124

Among those attending were Michael Barone, a Washington-based editor for the Reader's Digest. He also is an editor of the Almanac of American Politics, a reference book published every two years and popular with journalists. A delegation from The Washington Post was on hand, as were representatives of the Washington Times, Norfolk Virginian-Pilot, Richmond Times-Dispatch and smaller dailies across Virginia.

Conditions were crowded, but one reporter compared VCU's facilities favorably to those at a presidential debate he had attended in Lansing, Mich.

Transforming Campus

The event drew heavily on two principal facilities: the University Student Commons for a reception before the debate, and the Performing Arts Center, which hosted the debate.

At the Performing Arts Center, concert hall manager Curt Blankenship coordinated faculty and student schedules for both the venue and a series of practice rooms that were called into service for candidates' workrooms, media rooms and other details.

"Because classes and rehearsals are so time-oriented, altering schedules can potentially cause problems. It can be especially hard for students who normally practice in rooms with large ensembles, such as the organ, which they can't relocate to practice," Blankenship said.

"Though we ran into some frustrations during the planning process," he added, "I credit faculty, staff and students for cooperating with us and allowing this event to go off."

Almost daily, Blankenship helped coordinators review event plans on-site to ensure preparations were set for debate night. A relative newcomer to VCU, Blankenship drew on his special-events background to assist in stage set-up, lighting and sound systems.

Technical Support

From Wilder's invitation to Democrat Donald S. Beyer and Republican James S. Gilmore III, the debate quickly drew the attention of public television colleagues WCVE and WNVT, which agreed to produce the event for live coverage. Six television cameras - including four on-stage - captured each moment of the debate, which was broadcast live in every major television market in the state.

University News Services also partnered with the Medical College of Virginia Hospitals' Office of Marketing and Planning to produce a 90-second video about the university that aired during a break

Debate Virginia University News Services
"Debate Virginia '97 Reflects Teamwork Across University" 10/10/97 (p. 59-61)
A124

at the debate's midpoint.

News crews needed access for their coverage, so David Van Nest, director for media support services, helped to supervise and design the event's audio, visual and lighting aspects. Backstage Inc. lent its expertise in running the lighting and sound systems during the debate.

Other communications in the facility also were needed, including banks of telephones in the campaign suites and media rooms, along with facsimile machines and computer hookups. Van Nest's team also installed almost a dozen monitors throughout the building to bring the debate directly into the camps' temporary headquarters in the basement and the second-floor media rooms.

"From my technical vantage-point, I feel it went well," he said. "Up to the last minute, we had large and small changes with set-up and equipment, but I feel we planned enough ahead of time, which helped make things run smoothly."

Simultaneously in the final days, Facilities Management worked almost round-the-clock, setting up tables and chairs, podiums, banners and tents. Nearly 16 crew members were involved in installing a 1,000-kw generator for emergency power.

"Crew members worked 18-hour days preparing for the event and disassembling everything after it was over," said Dan Grenoble, supervisor for general services in the Facilities Management Department. "The crew worked long after the debate was over, bringing the building back to normal so that classes could start at 8 a.m. on Tuesday."

Access for Virginians

Wilder also was keenly interested in generating citizen involvement in the debate, so VCU agreed to launch both a World Wide Web site and a 1-800 telephone number. These outlets allowed citizens to submit potential debate questions.

While the high-tech forums increased citizen access to the debate, both required regular maintenance. "You can't create a Web site and let it sit there," said Ken Guyre, VCU Webmaster. "You need to update it regularly. For this site, we sometimes made changes or additions to it five times a day."

Guyre's expertise was called on for the creation and maintenance of the Web page, which by presstime had drawn more than 2,750 hits. In addition to simply checking out the site, more than 350 Web surfers posted questions for the candidates via the site's confidential form. The site included links to the candidates' Web pages, in addition to news releases, information about the former governor and a summary of the contenders' views on the issues.

The 1-800 number captured about 175 questions for the candidates in advance of the debate.

On Oct. 6, VCU Telecommunications arranged to have the number switched to live student operators to accept calls during the first half of the debate. Those queries were dispatched to the panelists on stage for use in the second half of the debate.

University News Services' Cari Brunelle, Bill Byrd, Brian Matt, Pamela C. Lippincott, Erin Lucero, Kyra Scarton Newman and Tyler Scott contributed to this report.

University News Services
debate@vcu.edu
Date Last Modified: Oct 10, 1997

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A125

LAURENCE DOUGLAS WILDER

April 7, 1997

Dear Jim,

I extend to you on behalf of station WRVA, Virginia's largest radio station (50,000 watts) with extended coverage in 38 states, an opportunity to discuss the issues in the 1997 Gubernatorial Campaign. I do so with the understanding that both of you are interested in reaching the widest possible audience so as to adequately inform the electorate of your views.

I propose to have Dr. Robert Holsworth of Virginia Commonwealth University and Dr. Larry Sabato of University of Virginia, both eminent political scientists, moderate the forum and to propound questions to each of you. I would like to facilitate the event by eliciting calls from the radio audience so that there might be direct participation by the audience. Too often we have witnessed debates being taken over by media types who may or may not raise concerns which are of genuine interest to the people.

I would look to hear from you via your representatives relative to arrangements, etc. We would vouchsafe for impartiality and fairness. We would be assured of prime time coverage on any Monday night, 8-10 p.m. and would likewise make arrangements for same to be aired statewide on public television. channels and any other media interested. We feel that you should have sufficient impute for so formulating.

Looking forward to hearing from you with confirmation of the concept with the concrete details to be agreed upon.

A126

Very Truly Yours,

Laurence Douglas Wilder

072

073

G0053

Wilder 4/7/97 letter to Candidate Gilmore* (p. 73)
A126

Virginia Commonwealth University

CENTER FOR PUBLIC POLICY
SCHERER HALL
923 W. FRANKLIN STREET
P.O. BOX 842028
RICHMOND, VIRGINIA 23284-2028

804 828-4971
FAX: 804 828-7463
TDD: 1-800 828-1120

DISTINGUISHED PROFESSOR
L. DOUGLAS WILDER

July 7, 1997

A127

Gentlemen:

This will confirm that negotiations have concluded relative to the date, time and place of the proposed gubernatorial debate, jointly sponsored by WRVA, WNVT and affiliates and VCU. The date agreed upon by all parties involved is October 6th at the Performing Arts Center at Virginia Commonwealth University. The time of the debate is 8-10pm. Dr. Robert Holsworth and Dr. Larry Sabato will be moderators along with a representative of the public broadcasting stations; I will be handling calls from the radio audience.

We will follow up details reference to a reception, numbers of tickets allotted participants and guests of the University, etc. as soon as the committee has fleshed out these details they will be forthcoming to you.

This promises to be as widely covered debate as we have had in the Commonwealth, and we look forward to the occasion.

Sincerely,

L. Douglas Wilder

cc: Don Beyer
Bill Bowman
Jim Gilmore
Dr. Holsworth
Roger McIntosh
Dr. Sabato
Dr. Trani

An Equal Opportunity/Affirmative Action University

G0083

VCU/Wilder 7/7/97 Co-sponsorship letter* (p. 84)
A127

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FAX 703/849-9796

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Central Virginia
Educational
Telecommunications
Corporation

July 16, 1997

The Honorable L. Douglas Wilder
Virginia Commonwealth University
Scherer Hall
923 W. Franklin Street
Richmond, VA 23284-2028

Dear Gov. Wilder:

With the change in date and location of the gubernatorial debate which is now set for Oct. 6th at the VCU Performing Arts Center, there is a necessary realignment of television broadcast schedules. As of this date here is where we stand with the television broadcast of the program:

WNVT - Northern Va.	will air live
WCVE - Richmond	will tape delay to 10 PM
WHTJ - Charlottesville	will tape delay to 10 PM
WBRA - Roanoke, Marion, Norton	is considering tape delay to 10 PM

WHRO - Hampton Roads, with the approval of you and WRVA, will seek to have the cable access channels in their broadcast area carry the program live as we feed it down the microwave. If this is done, you would then have live call-ins from Richmond, Northern Va. and Hampton Roads.

There is a PBS programming conflict on two counts. First, that evening at 8 PM is the scheduled time for the broadcast of the last of three parts of the biography of Harry S. Truman; and second, this program is part of a core feed agreement which stations have entered into with PBS to insure national coverage.

G0006

A128

Central Virginia Public Broadcasting will provide the remote television facilities and the microwave feed. We must depend upon WRVA to arraign for listener call-in telephone service and to provide TV with a suitable audio feed. Will VCU provide set lighting and remote truck power and parking?

Mr. Bill Bowman will produce the program for TV and will be responsible for coordination with your office and our technical support staff. Bill will be contacting you in the near future to initiate planning for the event. Thank you for thinking of public TV and providing this opportunity to serve the needs of the people.

Sincerely yours,

Roger A. McIntosh

cc: Bill Bowman, VCPT
Dr. Sydnor, CVETC
Dave DeBarger, CVETC
Mike Baker, WNVT
Marge Meyer, CVETC
Mary Pruess, WHRO

A129

G0007

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WNVT-TV 7/16/97 letter (pp. 85-86)
A129

Virginia Commonwealth University

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DISTINGUISHED PROFESSOR
L. DOUGLAS WILDER

September 4, 1997

The Honorable James S. Gilmore
Gilmore for Governor
PO Box 18071
Richmond, Virginia , 23226

A130

Dear Jim:

We are looking forward to your participating in the gubernatorial debate to be held on Monday, October 6 at the Performing Arts Center at Virginia Commonwealth University from 8:00 p.m. to 10:00 p.m. It promises to be an exciting evening and one that will be very important to the citizens of the Commonwealth.

Since receiving confirmation of your participation, we have been moving on a number of fronts to ensure that the debate proceeds smoothly. I have consulted with the panelists (Drs. Bob Holsworth and Larry Sabato) and developed a format for the debate that is outlined on the attached sheets. I have been working to ensure that the debate receives widespread coverage throughout the Commonwealth on television and radio. We now have a number of public, commercial and cable stations lined up to televise and broadcast the event. We also expect CSPAN to provide a national audience for the debate. Finally, I have convened a committee here at VCU to work on all the debate's logistical details and to coordinate with the television and radio folks.

At this point, it would be helpful if you could fax me (828-7463) in the next day or two the name and number of the person who will be leading your debate coordination team. We will want to speak with them and send them the final details of the debate's format. We also want to make sure that they will be able to view the facility and to meet with key members of the VCU committee and the television producers to ensure that you will be comfortable with the setting and the arrangements.

Again, let me thank you for your participation. I am certain that the debate will be of great value to the voters.

Sincerely,

L. Douglas Wilder
Distinguished Professor

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091

G0013

VCU/Wilder 9/4/97 letter to Candidate Gilmore with arrangements addendum* (pp. 91-93)
A130

Coin Flip:

A coin flip to determine the order in which the opening and closing statements are given and the order in which questions are addressed will be held with representatives of the candidates on Friday, October 3 at Virginia Commonwealth University. (Time and place to be arranged.)

Time and Location:

The debate will be held at the Virginia Commonwealth University Performing Arts Center on Monday evening, October 6, from 8:00 to 10:00 p.m. A reception will be held for the candidates and ticketholders at 6:00 p.m. at the Virginia Commonwealth University Student Commons.

Staging:

Candidates will be on the Performing Arts Center stage behind podiums. The candidates will be next to one another. The moderator will be located to the side of the candidates and the panelists will be seated on the side of the stage.

Television/Radio Coverage:

The station lineup for the debate as of today is listed at the end of this document. You will be informed of any additions to the lineup as these arise.

Format:

Welcome- Dr. Eugene Trani, President, Virginia Commonwealth University (90 seconds)

Introductions-Former Governor L. Douglas Wilder (90 seconds)

Opening Statements by Candidates-(90 seconds each)

Part One-

Questions of the candidates asked by the two panelists, Drs. Bob Holsworth and Dr. Larry Sabato. Time will be allotted for questions, answers, rebuttals, and a response to the rebuttal.

Part Two-

Questions directed by the candidates to one another. Time will be allotted for the question, the response, the rebuttal, and the response to the rebuttal.

VCU/Wilder 9/4/97 letter to Candidate Gilmore with arrangements addendum* (pp. 91-93)
A131

Part Three

Questions asked by the panelists drawn from those submitted prior to the event on a debate web page that will be created and during the event on a 800 call-in number that viewers and listeners can use. Time will be allotted for the response, the rebuttal, and the response to the rebuttal.

Final Statements by Candidates

90 seconds each.

**** There will be a 2 minute and 5 second break for station identification purposes at 8:57 p.m.

Ticket Arrangements:

Candidates will each receive 30 tickets for the debate. Candidates will able to bring 10 members of their staffs to the debate who will be able to watch the event in a room in the Performing Arts Center. Virginia Commonwealth University will distribute the remainder of the tickets in a manner that will prevent a partisan imbalance in the audience. In addition, there will be strict regulations governing audience behavior and strict enforcement of the regulations by the moderator.

VCU/Wilder 9/4/97 letter to Candidate Gilmore with arrangements addendum* (pp. 91-93)
A132

Virginia Commonwealth University

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TDD: 1-800 828-1120

DISTINGUISHED PROFESSOR
L. DOUGLAS WILDER

17 September 1997

The Honorable James S. Gilmore
Gilmore for Governor
PO Box 18071
Richmond, Virginia, 23226

Dear Jim:

Thanks for your letter about the upcoming debate and the names of the individuals who will be working with you on the event. From all that I am hearing. enthusiasm about the debate is increasing every day.

I have been working with the panelists, with the committee at VCU, and with the radio and television stations to ensure that the debate runs smoothly and provides Virginia's citizens with information that will be helpful to their choice on November 4th. At this point, I would like to invite both campaigns to participate in ironing out the final details.

First, it would be useful if your debate coordinator and/or the people who will be assisting him meet with key members of the VCU committee and representatives of the television and radio stations to view the Performing Arts Center. to see our staging arrangements, and to tour the facilities that will be available to you and your staff the evening of the event. We would like to arrange this meeting dealing with the staging and logistics of event on **Monday, September 22nd at 2 p.m. at the VCU Performing Arts Center at 922 Park Avenue on the VCU campus.** Please have someone from your staff call Ms. Meg Price. co-chair of the VCU committee and Executive Assistant to the President, at 828-1200 with the names of the individuals who will be attending the meeting. Ms. Price will ensure that the appropriate people from VCU and broadcast media will be there to answer your questions and take down any concerns that your debate coordinators may have.

Second, we are currently preparing a more detailed version of the format that was sent in my previous letter to you. We hope to get this version to you by early next week so that we can receive feedback from the campaign by the end of the week.

G0041

VCU/Wilder 9/17/97 letter to Candidate Gilmore* (pp. 96-97)
A133

The debate promises to be an exciting event that will be a highlight of the campaign. Thanks for your cooperation in providing this opportunity to the voters of Virginia.

Sincerely,

L. Douglas Wilder
Distinguished Professor

A134

VCU/Wilder 9/17/97 letter to Candidate Gilmore* (pp. 96-97)
A134

Virginia Commonwealth University

CENTER FOR PUBLIC POLICY
SCHEPER HALL
923 W. FRANKLIN STREET
P.O. BOX 842028
RICHMOND, VIRGINIA 23284-2028

804 828-4571
FAX: 804 828-7463
TDD: 1-800 828-1120

DOUGLAS PROFESSOR
L. DOUGLAS WILDER

24 September 1997

Lieutenant Governor Don Beyer
Beyer for Governor
1004 N. Thompson Street
Richmond, Virginia, 23230

A135

Dear Don:

Thanks for sending Alan Albert and Susan Platt to meet with Ms. Meg Price and other members of the VCU committee about the staging and logistics of the debate. I am very glad that we were able to reach a good agreement on the setup and other logistical details.

I have attached to this letter the format that we intend to use for the debate. It includes questions composed by the panelists and questions that will be drawn from the 1-800 number and the website that has been created for the debate. The format also includes an opportunity for the two candidates to question one another directly. I think that it is a lively format will keep both the viewers and the audience engaged. More importantly, I believe that it is a format that will benefit the citizens of the Commonwealth by providing an unparalleled opportunity for them to see the candidates discussing the issues that are facing Virginia.

If you or your staff have any questions about the format, please fax these to me at 828-7463. Please do this by the close of business on Monday, September 29, so that we can make the decision about any final adjustments by the middle of the week. We will be setting up a coin flip on Friday, October 3 and, at that time, we will iron out any last minute logistical details that may arise.

Once again, thank you very much for your cooperation. I am looking forward to seeing you on October 6.

Sincerely,

L. Douglas Wilder

VCU/Wilder 9/24/97 letter Candidate Beyer with format addendum* (pp. 100-103)
A135

INTENDED FORMAT:

Introductions: 8:00 p.m.-8:04

8:00- Program Introduction- Radio and Television (60 seconds)

8:01 - Welcome- Dr. Eugene Trani, President, Virginia Commonwealth University (90 seconds)

8:02.30 -Candidate and Panelist Introductions and Statement of Rules-Former Governor L. Douglas Wilder (90 seconds)

Opening Statements: 8:04-8:07

8:04- Candidate 1 (C1)-(90 seconds)

8:05:30 Candidate 2 (C2)- (90 seconds)

Round One: Panelists Question the Candidates: 8:07-8:57.55

1. Designation of Candidates and Panelists.

The panelists will be designated Panelist 1 (P1) and Panelist 2 (P2). The candidate who makes the first opening statement will be Candidate 1 (C1) and the candidate who makes the second opening statement will be Candidate 2 (C2)

2. Format

A. Question (30 seconds)

B. Response (90 seconds)

C. Rebuttal (60 seconds)

D. Surrebuttal (30 seconds)

3. Order in which the initial question will be posed during the round.

P1 to C1, P2 to C2, P2 to C1, P1 to C2, and repeat until time expires

Break: 8:57:55-9:00

A136

Round Two: Candidates Question Each Other: 9:00-9:28

1. Format

A. Question (30 seconds)

B. Response (90 seconds)

C. Rebuttal (60 seconds)

D. Surrebuttal (30 seconds)

2. Order of questions

The candidate who was the **respondent** to the final question in Round One will **ask** the first question in this segment of the debate and the questions will then alternate between the candidates until time expires.

Round Three: Candidates Answer Questions Posed by the Citizens of the Commonwealth and Drawn by the Panelists From the Website and the 1-800 Number. 9:28-9:54

1. Format

A. Question (30 seconds)

B. Response (90 seconds)

C. Rebuttal (60 seconds)

D. Surrebuttal (30 seconds)

2. Order of Questions

The candidate (either C1 or C2) who asked the last question in Round Two will respond to the initial question in this segment of the debate. Panelists (P1 and P2) will then ask questions according to the order outlined in Round One until time expires.

Final Statements: 9:54-9:57

C1 (90 seconds)

C2 (90 seconds)

061

A137

Closing: 9:57-9:58

Governor Wilder (30 seconds)

Television and Radio Fade Outs

Additional Matters:

1. Candidate Designation-A coin flip will be held on Friday, October 3 at Virginia Commonwealth University. The winner of the coin flip will choose whether he wants to be designated as C1 or C2. The candidate who makes the first opening statement will also make the first final statement. The candidate who makes the second opening statement will make the second final statement.

2. Timekeeper- A timekeeper will be located on the stage and will utilize color coded signs to indicate the amount of the allotted time that is left when a candidate is speaking. The signs will indicate 60 seconds, 30 seconds, and 15 seconds.

3. Audience Rules- The audience will be informed before the debate and will be instructed by the moderator at the beginning of the debate that applause and other displays of support and disapproval are not permitted. The moderator will also inform the audience that he retains the right to take away time from the candidate whose supporters engage in such behavior.

4. Moderator- The moderator will ensure that the rules of the debate are followed and that it proceeds smoothly.

A138

062

VCU
Virginia Commonwealth University

Office of the President
President's House
910 West Franklin Street
P.O. Box 842512
Richmond, Virginia 23284-2512

804 828-1200
FAX: 804 828-7532
TDD: 1-800 828-1120

September 26, 1997

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street, Suite 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manager
Gilmore'97
4914 Fitzhugh Avenue, Suite 202
Richmond, Virginia 23230

Dear Susan and Bryan:

I enjoyed meeting with you to discuss the logistics of *Debate Virginia* and am looking forward to continuing to work with you on this important program for the candidates and for Virginia Commonwealth University.

The enclosed rough sketch of the stage set-up in the Performing Arts Center has been reviewed and approved by the appropriate individuals. I am forwarding it to the representatives of WCVE Channel 23 and WRVA as well as the members of the VCU committee handling internal arrangements so that we can proceed with lighting and sound.

As we agreed, a timekeeper will be added to the stage in full view of both candidates and a color-coded card system for timing the responses will be utilized.

I look forward to hearing from you on additional issues regarding the debate. Thank you.

Sincerely,

Mrs. Meg Fontaine Price
Executive Assistant to the President
and Board of Visitors
Co-Chair, *Debate Virginia*
Committee

G0037

A139

VCU/Trani 9/26/97 letter to Candidate Campaign Managers (pp. 108-109)
A139

emj

attachment

copy: Mr. David M. DeBarger, Director of Creative Services, WCVE
Mr. John Francioni, Chief Engineer, WRVA
Debate Virginia Committee
The Honorable L. Douglas Wilder, Distinguished Professor,
Virginia Commonwealth University

A140

G0038

VCU/Trani 9/26/97 letter to Candidate Campaign Managers (pp. 108-109)
A140

VCU
Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
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RICHMOND, VIRGINIA 23284-2512

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October 1, 1997

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street, Suite 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manager
Gilmore'97
4914 Fitzhugh Avenue, Suite 202
Richmond, Virginia 23230

A141

Dear Susan and Bryan:

Please accept my thanks again for working with us at Virginia Commonwealth University regarding planning for *Debate Virginia*. Listed below are several items for your information:

- On Friday, October 3, at 3:00 p.m. we will hold a coin toss to determine which candidate will speak first in the opening remarks for *Debate Virginia*. The coin toss will be held on the stage of the Performing Arts Center. A name will be drawn to determine which campaign makes the call. The winner will select one of the following options:
  - *C1*: the candidate who speaks first in the opening remarks will speak first in the closing remarks;
  - *C2*: the candidate who speaks second in the opening remarks will speak last in the closing remarks.

- Since we have not heard about campaign preferences for Green Room assignments, podium assignments, and seating location for the candidates' guests, we will follow the coin toss with another flip of the coin to determine these assignments. I will flip the coin in both cases.

- As I am sure you can appreciate, tickets for the debate are in extremely high demand, and we are still able to allot only 30 per campaign. Included in the 30 tickets are those for family members. Please let us know as soon as possible which family members will be attending and their ticket preferences, and we will be pleased to place reserved signs on their seats.

- We also will be happy to credential up to 15 staff members for each campaign. We will need the names of the staff members to be credentialed as soon as possible.

VCU/Trani 10/1/97 letter to Candidate Campaign Managers (pp. 112-113)
A141

- I would like to alert you that for academic reasons, we are unable to close the entire basement of the Performing Arts Center for the day. We will, however, make the Green Rooms available at 1:00 p.m. with a VCU security guard stationed outside each door to ensure that the campaign staffs have access. At 5:00 p.m., all access to the part of the basement that we will be using will be closed except to the campaign and VCU staff who have credentials. The other portion will be blocked off for a dress rehearsal taking place that evening.

- I would like to follow-up to a question that we have been asked regarding how cameras will be used during the debate. I spoke with the director of the program, and he indicates that there will be a camera directly in front of each candidate during the entire debate. A red light will come on whenever a candidate is on the air. The director will switch cameras between the candidates according to who is speaking. There will be other cameras in the auditorium as well. The director may switch to another camera when, for example, there is an exchange between the candidates and a shot of both would be best. In any case, it is his philosophy to portray the candidates in the best possible context. Consequently, candidates should be looking into the camera directly in front of them, since he estimates that 90 percent of the time that a candidate is speaking will be on the air.

I hope this information is helpful to you as you prepare the candidates for the debate. Please let me know if you have any questions at this stage. I look forward to seeing you on Friday for the coin flips.

Sincerely,

Mrs. Meg Fontaine Price
Executive Assistant to the President
and Board of Visitors
Co-Chair, Debate Virginia Committee

emj

copy: Governor L. Douglas Wilder

A142

0X2

VCU/Trani 10/1/97 letter to Candidate Campaign Managers (pp. 112-113)
A142

Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE •
910 WEST FRANKLIN STREET
P.O. BOX 842512
RICHMOND, VIRGINIA 23284-2512

804 828-1200
FAX: 804 828-7532
TDD: 1-800 828-1120

October 2, 1997

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street, Suite 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manager
Gilmore '97
4914 Fitzhugh Avenue, Suite 202
Richmond, Virginia 23230

Dear Susan and Bryan:

I wanted to inform you of a procedural item for Monday night's debate. I have been advised that candidates should not bring with them to the stage any props, notebooks, or notes. Additionally, they should not wear or display any messages on their clothing. Virginia Commonwealth University will provide paper and pens which will be available on the podium for each candidate.

I also would like to remind you that the 30 people from each campaign that are using the tickets as well as campaign staff are invited to attend a reception at the Student Commons on October 6 beginning at 6:00 p.m.

Please let me know if you have any questions. I look forward to seeing you tomorrow at the coin flips.

Sincerely,

Meg Price

Mrs. Meg Fontaine Price
Executive Assistant to the President
and Board of Visitors
Co-Chair, Debate Virginia Committee

jas

copy: Governor L. Douglas Wilder

G0065

120

0 9

A143

VCU/Trani 10/2/97 letter to Candidate Campaign Managers (p. 120)
A143

Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
P.O. BOX 842512
RICHMOND, VIRGINIA 23284-2512

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FAX: 804 828-7532
TDD: 1-800 828-1120

October 3, 1997

A144

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street, Suite 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manager
Gilmore '97
4914 Fitzhugh Avenue, Suite 202
Richmond, Virginia 23230

Dear Susan and Bryan:

There are several items that I need to call to your attention at this time.

COIN TOSS

- To determine who will call the first coin toss, a candidate's name will be drawn. The campaign staff member will call "heads or tails." The first coin toss will be to select:

Beyer

C1: The candidate who speaks first in the opening remarks will speak first in the closing remarks.

or

C2: The candidate who speaks second in the opening remarks will speak last in the closing remarks.

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VCU/Trani 10/3/97 letter [#1] to Candidate Campaign Managers (pp. 121-123)
A144

- The opposing campaign staff member will call "heads or tails" for the second coin toss to select:

Bryan
Gilmore

C1: Podium A (refer to attached diagram), corresponding seats for guests and Green Room B-15.

or

C2: Podium B (refer to attached diagram), corresponding seats for guests, and Green Room B-40.

A145

NO USE AGREEMENT

- Both campaigns have agreed to sign a 1997 No Use Agreement. We are asking that both the candidates and the campaign managers sign this agreement.

TIMEKEEPERS

- A decision has been made to have a timekeeper for each candidate. These individuals, provided by Virginia Commonwealth University, will be seated next to the camera in the direct line of sight of each candidate. This decision was based on television production requirements as well as fairness to both candidates.

The timekeepers will use the following color-coded system:

GREEN	60 seconds
BLUE	30 seconds
YELLOW	15 seconds
RED	Time Expired

~~081~~

REQUEST FOR INFORMATION

If you have not already supplied the following information, please call Ms. Sybil Halloran of my staff at 828-1200 as soon as possible:

- *The names of the campaign staff members who need credentials.*

  Security will be stationed at each Green Room. Until the Security person recognizes campaign staff members, we will require both a picture identification and credentials. This is to insure protection for both campaigns.

- *The number of parking spaces needed by each campaign for staff members.*

  Parking passes for guests are provided with the tickets. Once we have this number, we will provide you with parking assignments.

Please feel free to contact me if I may answer any questions.

Sincerely,

Mrs. Meg Fontaine Price
Executive Assistant to the President
and Board of Visitors

jas

A146

Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
P.O. BOX 842512
RICHMOND, VIRGINIA 23284-2512

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FAX: 804 828-7532
TDD: 1-800 828-1120

October 3, 1997

A147

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street, Suit 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manager
Gilmore '97
4914 Fitzhugh Avenue, Suite 202
Richmond, Virginia 23230

Dear Susan and Bryan:

As a follow-up to earlier conversations, I offer the following:

Notes and Props

- Governor Wilder will not allow props, notes, or note pads at the podiums. We will supply each candidate with a pad of paper and pens.

Credentials for Campaign Staff

- Governor Wilder has agreed to allow 10 more credentialed staff per campaign. Please fax your complete list of 25 staff members to Ms. Sybil Halloran at 828-7532 as soon as possible.

Pre-debate Schedule

- The following is a tentative pre-debate schedule. Once it has been confirmed by the television station, we will fax you verification.
  - *7:44 p.m.* Mr. Gilmore is escorted from his greenroom to the stage. He will walk behind the backdrop on stage, and proceed to his side of the stage (see attached diagram).
  - *7:46 p.m.* Mr. Beyer is escorted from his greenroom to his side of the stage (see attached diagram).
  - *7:48 p.m.* The candidates join in the middle of the stage for a photographed handshake.

An Equal Opportunity/Affirmative Action University

084

VCU/Trani 10/3/97 letter [#2] to Candidate Campaign Managers (pp. 125-126)
A147

- *7:50 p.m.* The candidates move to the podiums for a final sound and light check.

Demonstrators

- In order to insure that we do not infringe on first amendment rights and if demonstrators do appear, they will be asked to move across Park Avenue and Grove Avenue to a location near the VCU Music Center. Security will remain at that location (see attached map).

Please feel free to contact me with any questions. I look forward to seeing you on Monday.

A148

Sincerely,

Meg F. Price
Executive Assistant to the President
and Board of Visitors

attachment

sch

copy: The Honorable L. Douglas Wilder

Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
P.O. Box 842512
RICHMOND, VIRGINIA 23284-2512

804 828-1200
FAX: 804 828-7532
TDD: 1-800 828-1120

October 6, 1997

A149

Ms. Susan Platt
Campaign Manager
Don Beyer for Governor
1004 North Thompson Street
Suite 300
Richmond, Virginia 23230

Mr. Bryan Slater
Campaign Manger
Gilmore '97
4914 Fitzhugh Avenue
Suite 202
Richmond, Virginia 23230

Dear Susan and Bryan:

Enclosed are six tickets for each campaign. We inadvertently gave each of the campaigns 34 rather than 40 tickets on Friday. I apologize for the error, and for any inconvenience it may have caused.

Please contact me if you have any questions.

Sincerely,

Meg F. Price
Executive Assistant to the President
and Board of Visitors

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127

An Equal Opportunity/Affirmative Action University

VCU/Trani 10/6/97 letter to Candidate Campaign Managers (p. 127)
A149

VCU
Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
P.O. BOX 842512
RICHMOND, VIRGINIA 23284-2512

804 828-1200
FAX 804 828-7532
TDD: 1-800 828-1120

BY FAX
MEMORANDUM

TO: **Ms. Susan Platt**
Campaign Manager
Don Beyer for Governor

Mr. Bryan Slater
Campaign Manager
Gilmore '97

FROM: **Meg Fontaine Price**

DATE: **October 6, 1997**

Attached is a map designating the location that campaign staff should arrive for parking. Campaign staff will either be valet parked or directed to nearby parking. The parking staff will be stationed on the scene before 1:00 p.m. today.

Please send me the list of the 25 staff who need credentials. Credentials may be picked up upon arrival at the Performing Arts Center on the second floor near the media area.

Also, please fax me a signed copy of the *No Use Agreement*. We must have this back immediately.

Thank you for your assistance.

jas

enclosure

A150

VCU/Trani 10/6/97 memorandum to Candidate Campaign Managers (pp. 129-130)
A150

Virginia Commonwealth University
Academic Campus
Parking Locator

A151

Campaign staff valet parking

130

VCU

Office of Parking & Transportation Services

327 West Main Street
P.O. Box 843002
828-8726

G0056 ~~059~~

VCU/Trani 10/6/97 memorandum to Candidate Campaign Managers (pp. 129-130)
A151

Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
P.O. BOX 842512
RICHMOND, VIRGINIA 23284-2512

804 828-1200
FAX: 804 828-7532
TDD: 1-800 828-1120

1997 NO-USE AGREEMENT

I agree not to use original or secondary audio/video footage from the gubernatorial debate held on October 6, 1997, at the Performing Arts Center of Virginia Commonwealth University in Richmond, Virginia, for any political advertising use or for any purpose other than internal review by the campaign staff. I understand and agree that neither campaign will record the debate on camera.

A152

Bryan Slater, Campaign Manager
Jim Gilmore for Governor

Date 10/4/97

Witness _____ *Date* 10/9/97

James S. Gilmore
Republican Candidate for Governor

Date 10/4/97

Witness _____ *Date* 10/6/97

Susan Platt, Campaign Manager
Don Beyer for Governor

Date

Witness _____ *Date* _____

Don Beyer
Democratic Candidate for Governor

Date

Witness _____ *Date* _____

0X1

4x Raw Grayscale/Mixed Scan Density

VCU/Trani 1997 No-Use Agreement (pp. 132-133)
A152

VCU
Virginia Commonwealth University

Office of the President

President's House
310 West Franklin Street
P.O. Box 842512
Richmond, Virginia 23284-2512

804 828-1200
FAX: 804 828-7832
TDD: 1-800 828-1120

1997 NO-USE AGREEMENT

I agree not to use original or secondary audio/video footage from the gubernatorial debate held on October 6, 1997, at the Performing Arts Center of Virginia Commonwealth University in Richmond, Virginia, for any political advertising use or for any purpose other than internal review by the campaign staff. I understand and agree that neither campaign will record the debate on camera.

A153

Bryan Slater, Campaign Manager
Jim Gilmore for Governor

Date

Witness _____ *Date* _____

James S. Gilmore
Republican Candidate for Governor

Date

Witness _____ *Date* _____

Susan Platt, Campaign Manager
Don Beyer for Governor

Oct. 5, 1997
Date

Witness Cara Brown *Date* October 5, 1997

Don Beyer
Democratic Candidate for Governor

October 5, 1997
Date

Witness _____ *Date* OCTOBER 5, 1997

133

G0061

02

VCU/Trani 1997 No-Use Agreement (pp. 132-133)
A153

The Virginia Reform Party
aka The Virginia Independent Party
3809 Dillon's Fork Road, Fieldale, Virginia 24089
Home/Fax: 540-673-2577
E-Mail DBAUCHE@digdat.com

October 21, 1997

A154

Dr. Eugene Trani, President
VIRGINIA COMMONWEALTH UNIVERSITY
910 West Franklin Street, 1st Floor
Richmond, Virginia 23221

Dear President Trani:

As you are undoubtedly aware, Virginia Commonwealth University sponsored and managed Debate Virginia on Monday, October 6, 1997. Without any published regulations, formal process or opportunity for me to be heard, your agents simply excluded me from this taxpayer-funded Virginia gubernatorial candidates debate despite the fact that I am a qualified gubernatorial candidate on the l997 ballot representing The Virginia Reform Party.

VCU's unlawful action benefited my two opponents and did tremendous damage to my campaign. Your institutional actions not only excluded and discriminated against my viewpoints on the issues, they implicitly endorsed and publicized my two opponents' views and sent a message of official endorsement of their campaigns and disapproval of my own campaign to the Virginia Electorate several weeks before the election. You have discriminated against my views, reduced my chances of winning and jeopardized my ability to capture 10% of the vote, which is what I need to qualify as a Reform Party candidate in the next election. In this razor-close contest, the gubernatorial exclusion of The Virginia Reform Party candidate has actively changed the dynamics of the race.

In order to restore some semblance of integrity to your university as a place of free and fair public debate and to ensure untainted democracy in the electoral process, I am asking that VCU sponsor and manage another debate at VCU before the November 4th election to which you will invite all three candidates, the Democrat, Reform and Republican nominees. I respectfully request that you have Douglas Wilder moderate the debate, as he did the first one, and that you use the exact same amount of resources in mobilizing public and media attention for this debate as you did for the first one, including your website and 1-800 tollfree telephone number. I understand that you cannot guarantee the participation of the other candidates at this point, but that will be up to them to decide, and you have the responsibility to mitigate the impact of your initial lawless intervention into the gubernatorial campaign.

I am enclosing a copy of *Forbes v Arkansas Educational Television Commission*, 93F2d.497 (8th Cir. 1996), now in the Supreme Court, which establishes that governmental actors may not exclude candidates from publicly-sponsored debates on the subjective and arbitrary ground of candidate "viability". I am enclosing a copy of *Rosenberger v Rector of the University of Virginia*, 115 S.Ct.2510 (1995), which establishes that public universities and their agents are state actors and may not discriminate against speakers in public fora based on their viewpoint, whether popular or unpopular.

As an academic leader promoting public service, the free marketplace of ideas and real democracy, VCU has an obligation to begin to undo the damage it has visited upon my campaign. I look forward to your rapid response and to participating in a debate at VCU in the next two weeks. My telephone number is 540-673-2577.

A155

Yours very truly,

Sue Harris DeBauche

Sue Harris DeBauche
Candidate for Governor
The Virginia Reform Party

DeBauche 10/21/97 letter to Trani (pp. 141-142)
A155

VCU
Virginia Commonwealth University

OFFICE OF THE PRESIDENT

PRESIDENT'S HOUSE
910 WEST FRANKLIN STREET
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TDD: 1-800 828-1120

October 24, 1997

Ms. Sue Harris DeBauche
The Virginia Reform Party
3809 Dillon's Fork Road
Fieldale, Virginia 24089

Dear Ms. DeBauche:

This will respond to your letter dated October 21, 1997, which was transmitted by fax and received yesterday, October 23, 1997. In your letter, you have expressed concerns about the fact that Virginia Commonwealth University recently made some of its resources, such as the VCU Performing Arts Center, available for use in connection with a debate between James S. Gilmore, III and Donald S. Beyer, Jr., two candidates for Governor of the Commonwealth of Virginia.

While reserving the right to disagree with other portions of your letter, I want to take this opportunity to say that your concerns about VCU's actions are not well-founded. With all due respect, you simply misunderstand the role played by VCU in connection with the debate. VCU often makes its facilities available for use in connection with events of probable interest to the University community or the public at-large. Our efforts to accommodate such events does not make VCU responsible for the choice of speakers or the content of their remarks.

While we must decline your request that VCU sponsor a three-way gubernatorial debate between now and Election Day, you may wish to consider using the VCU Performing Arts Center or other VCU resources (e.g. VCU website, 1-800 tollfree number) in connection with an event for your own campaign, including any debate you may arrange with any other candidate. We will make every appropriate effort to accommodate any such request.

Sincerely,

Eugene P. Trani
President

/sch

Richmond Times-Dispatch
News Index
Feedback
Gateway Virginia

Monday, October 6, 1997

Wilder holds election wild card

Former governor will moderate tonight's debate

From Wire and Staff Reports

A157

Different year, different election, same question:

Will former Gov. L. Douglas Wilder, who is the host of a debate tonight between the candidates for governor, endorse the Democrat and deliver to him the votes of many black Virginians?

With Donald S. Beyer Jr., the Democrat, and James S. Gilmore III, the Republican, in a race that polls show is a dead heat, Wilder holds the wild card that could provide the decisive votes.

It's happened before. After he abandoned his independent bid for the U.S. Senate in 1994, Wilder waited until the last minute before endorsing his bitter political rival, Dem ocratic incumbent Sen. Charles S. Robb.

The move energized black voters, who make up about 18 percent of the Virginia electorate. Robb edged Republican Oliver L. North by 3 percentage points, largely thanks to winning 95 percent of the black vote.

Beyer is hoping for a similar boost. The Democratic nominee for governor was Wilder's ticket mate in 1989, when Wilder became the nation's first black elected governor.

"He's an old friend, we've served together and I've worked loyally with him for a long time," Beyer said in an interview.

But Wilder, ever the maverick, frequently has criticized Beyer and has left open the possibility of not making an endorsement -- or even backing Gilmore, the former attorney general.

Wilder has said he will not make a decision on any endorsement until some time after the debate. However political analysts -- and voters -- are sure to take close note of Wilder's words as he takes center stage in what many consider a pivotal moment of the gubernatorial campaign.

The debate will be held at Virginia Commonwealth University in its Performing Arts Center beginning at 8 p.m. Wilder will be the moderator. Political scientists Robert D. Holsworth of VCU and Larry Sabato of the University of Virginia will be the panelists posing questions, some of which will be provided by the public.

**Article, "Wilder holds election wild card,"
Richmond Times-Dispatch 10/6/97 (pp. 144-146)
A157**

Holsworth said each candidate will be allowed a 90-second opening statement. Holsworth and Sabato will ask questions until 8:57 p.m., when there will be a short break.

Then the candidates will ask questions of each other from 9 to 9:30 p.m., Holsworth said. Next, the panel will pose questions submitted by the public. Finally, the candidates will be allowed brief closing statements.

"The first 45 minutes there will be a lot of fireworks," Holsworth predicted. It's important to both candidates because "it's the first galvanizing event of the campaign."

Holsworth said he expects Beyer to point out the pair's differences and Gilmore to present his case for the tax cut and to fend off some of the recent Beyer commercials.

Both candidates need to do well, Holsworth said, but a good showing is particularly important for Beyer because Gilmore is heir to an incumbent governor.

Wilder said he has not set a timetable for when he will make a decision about an endorsement.

"They both are decent people and have records of that," Wilder said in an interview. "They are family men and have good records in office."

Wilder played down his influence, saying he doesn't tell others how to vote.

"What I have said all along is . . . I might tell people how I would vote," Wilder said.

But political analysts say that is enough to influence a considerable number of black voters, who could again hold the key in a close election.

"I certainly do not think anyone should underestimate Doug Wilder's capacity to affect the outcome of an election," said Tom Morris, a political analyst and president of Emory & Henry College. "It's not unthinkable that he could be the major player."

Morris and Sabato agree that neutrality by Wilder would help Gilmore.

"Black voter turnout in Virginia goes up when there's a sense of threat," Sabato said. "If Wilder doesn't care enough to pick, there must not be a threat."

Morris said Wilder already "has legitimized Gilmore somewhat by leaving open the possibility that he might support him, or at least not support the opponent."

Sabato finds it hard to believe Wilder actually would endorse Gilmore because "the retribution from the Democratic Party would be too great."

Article, "Wilder holds election wild card,"
Richmond Times-Dispatch 10/6/97 (pp. 144-146)
A158

Gilmore, however, hasn't given up on the idea. He met privately with Wilder earlier in the campaign.

"I'd very much like to have Governor Wilder's support. I think he's got considerable influence," he said.

Staff writer Tyler Whitley and Associated Press writer Larry O'Dell contributed to this report.

State Elections Update Index | Metro and Virginia Stories Index

Richmond Times-Dispatch	Feedback	News Index	Gateway Virginia

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**Article, "Wilder holds election wild card,"
Richmond Times-Dispatch 10/6/97 (pp. 144-146)
A159**

OBITUARIES B2
VIRGINIA B4
WEATHER B8

METRO

POLITICS B7

A 17-year-old Henrico County girl who told police that her former boyfriend fatally shot himself has been charged with his murder.

The girl, whose name was not released because of her age, was charged in the slaying of Patrick Butler, 26, of the 3800 block of Howard Road, said Henrico police Lt. Jan Stem.

Butler's body was found in the woods in the 3800 block of Bolling Road about 5:10 p.m. Friday, after his former girlfriend called 911 to report that Butler had committed suicide. But police determined the girl shot Butler during a domestic altercation, Stem said.

Stem said Butler and the girl walked to a popular spot in the woods, where the girl allegedly shot Butler with his .25-caliber pistol. He died at the scene.

Stem said it was unclear what sparked the shooting. He said Butler and the girl had dated in the past.

The killing was Henrico's 18th of the year.

REX BOWMAN

HIDDEN CAMPAIGN. Sue Harris DeBauche is running for governor with the Virginia Reform Party.

DeBauche leads Reform Party charge

Her name will appear first on ballot

BY REX BOWMAN
TIMES-DISPATCH STAFF WRITER

DILLON'S FORK — Sue Harris DeBauche unsuccessfully ran for office four years ago — seeking a supervisor's seat in Henry County's Blackberry District — and received a miserable 167 votes. With a million more, she figures, she can be Virginia's next governor.

"A lot of people are still unhappy," DeBauche said, defining her base of potential supporters. "And I always think right will prevail."

A wispy woman with a penchant for taking in wounded and weary animals on her small farm near the North Carolina line, DeBauche was tapped last month to carry the Virginia Reform Party's banner in the governor's race. She's the party chairman.

The party's original choice had to leave the state for family reasons.

Upon the slender shoulders of this Dillon's Fork native, a choir director and accountant, rest the hopes of the greenhorn populist party formed five years ago from a collective anger at Democrats and Republicans.

But even the tall clumps of pampas grass in her neighbor's yard are seemingly conspiring to keep her gubernatorial candidacy a secret: The grass largely hides the "DeBauche for Governor" sign in her yard from motorists' views.

The situation is analogous to how the Reform Party's candidates are being treated statewide, she said.

Polls put Democrat Donald S. Beyer Jr. and Republican James S. Gilmore III in a dead heat, but pollsters usually haven't bothered to ask about DeBauche, whose name will appear atop the ballot. Neither was DeBauche invited to take part in a televised gubernatorial debate last week at Virginia Commonwealth University.

■ Campaign Spot Watch. Page B7.

The treatment her party has received rankles DeBauche, 52. "It's a slap in the face to all the citizens in the state," she said, "especially after we worked so hard to get on the ballot."

She has strong views on other subjects — for instance, she said state lottery proceeds should go to localities to spend on education, vouchers for private schools are a bad joke, and the other candidates' talk of a tax cut are "ludicrous" attempts to pay for votes. But the debate snub, DeBauche said, highlights why voters should pay attention to the Reform Party's major campaign plank, which is . . .

Campaign finance reform.

"The two-party monopoly has to stop," said DeBauche. "The other parties can't even talk about campaign finance reform — they're get-

PLEASE SEE REFORM, PAGE B7 ▶

TOMORROW: THE STATE IS HELPING NONCUSTODIAL PARENTS TO SEE THEIR CHILDREN MORE OFTEN

Article, "DeBauche leads Reform Party charge," Richmond Times-Dispatch 10/14/97 (pp. 147-148) A160

Richmond Times-Dispatch

DeBauche sees power swaps

REFORM *FROM PAGE B1*

ting all they want. Wherever you have a monopoly, you have social and economic injustices. The Republicans and Democrats just take turns playing games with our lives, so it doesn't make a difference which one is in power."

The Reform Party is running candidates for governor, lieutenant governor and five House of Delegates seats. They are calling for new state laws requiring political contributors to live in the same district as the candidate they are supporting. A contributor could give no more than $1,000, and no political action committees or corporations would be allowed to donate.

Only with that kind of reform, DeBauche said, would voters unhappy with Republicans and Democrats have a true chance to elect a candidate more in tune with their wishes. Ross Perot, the Texas billionaire and two-time presidential candidate whose United We Stand America organization gave birth to the Reform Party, received 6 percent of the vote in Virginia last year, DeBauche pointed out: "He would have done better if they'd let him in the debates."

If Virginians will use their votes to elect Reform Party candidates, DeBauche said, they can set about the work of restoring . . .

Citizens' rights.

DeBauche and the other Reform candidates are calling for new laws that strip the General Assembly of any ability to block initiatives and referendums — the process, prevalent in California, in which residents get questions put to statewide votes. Eight-year term limits would also ensure a constantly replenished democracy, according to the Reform Party.

"Instead of protecting our rights, they're always restricting them," DeBauche said.

As an example, DeBauche said restrictions on gun purchasing and ownership are onerous and should probably be "undone."

Instead of creating laws that tell people what to do and how to live, she said, the state government should be working hard to create . . .

Jobs.

"The economy is not that vibrant," DeBauche said. "It might be in Fairfax, but it's not vibrant down here [in Henry County]. A lot of people are working temporary jobs, but I don't consider a temporary job a real job."

What Reform Party candidates would do to create jobs is still sketchy. But DeBauche said she would work hard with legislators to lure industries, and she would always oppose international trade agreements — such as the North American Free Trade Agreement — that impose restrictions on the United States but create exemptions for other countries.

With a Reform governor, DeBauche said, Democratic legislators wouldn't have to worry about supporting a Republican governor's programs and likewise for Republican legislators with a Democratic governor. With some of the partisanship removed, she said, government can spend more time creating jobs.

"Lots of governors spend time in Africa and Europe and Asia," DeBauche said. "But would I travel around a lot on the people's budget? No. I'm not going on a world site-seeing tour. But I'll do as much as I can."

Her quest for the governor's job may seem quixotic, DeBauche admitted: She has no campaign staff to speak of, no phone bank to get out the vote, no fund-raising arm. There are no television commercials, no mass mailings, no major endorsements. Election-Day poll workers will be few and far between.

"I want people to understand," she said, "that with the two-party system as it is at present, nothing is going to change. And any time you have the power concentrated in the hands of an elite few, you have social and economic injustice.

"If you want reform, you must vote for it this year. And we're here."

Perot '92 vote got place on ballot

The Virginia Reform Party candidates have a place on the ballot this year because presidential candidate Ross Perot won more than 10 percent of the vote in Virginia in 1992.

The party then backed J. Marshall Coleman in 1994, who won more than 10 percent of the vote when he ran for the Senate as an independent.

Perot did not win 10 percent in the 1996 presidential election, so the party needs to win 10 percent of the vote in a statewide race this fall to keep its officials state designation.

SUE HARRIS DEBAUCHE

- **Born:** Aug. 15, 1945; Dillon's Fork
- **Residence:** Dillon's Fork, Henry County
- **Occupation:** free-lance business manager and accountant
- **Elected office:** None.
- **Public/professional service:** Chairman of Virginia Reform Party; 5th District chairman of Virginia Independent Party, 1993-1997; 5th District chairman of United We Stand America, 1992-1993
- **Education:** B.S. in business management, University of California at Irvine
- **Family:** Single. CHILDREN: April Amoreena, 23. GRANDCHILDREN: Hayli, 4; Ambrianna, 1.
- **Campaign Web site:** www.naxs.com/people/mcgoat-s/homepage.htm
- **Campaign e-mail:** DBAUCHE-@digdat.com
- **Campaign telephone:** (540) 673-2577

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Article, "DeBauche leads Reform Party charge,"
Richmond Times-Dispatch 10/14/97 (pp. 147-148)
A161

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Richmond Times-Dispatch
VIRGINIA'S NEWS LEADER

More Power to Him

Richmond's new school Superintendent, Albert Williams, will attend his first School Board meeting October 20. Between now and then, Board members will consider rescinding the policy change,they made last year prohibiting the Superintendent from reassigning or transferring personnel without Board approval.

They should reverse themselves and reinstate the original policy.

If Williams can't be trusted with such elementary decisions, then the Board should not have hired him. Revoking the authority to transfer personnel was intended as an insult to Patricia Conn. What is the purpose of hamstringing Williams, in whom Board members presumably have confidence?

Last year's imbroglio created the impression that the Board was merely grabbing for power. If that is untrue, then endowing Williams with full authority might help negate that unfortunate perception.

She's Right

Sue Harris DeBauche is not a happy woman. She resents being excluded from the gubernatorial debate between Don Beyer and Jim Gilmore that took place a few days ago at VCU. And she should.

Ms. DeBauche is the Reform Party's candidate for Governor. Virginia recognizes the Reforms as a legally valid political party, and Ms. DeBauche's name will appear at the top of the ballot on November 4.

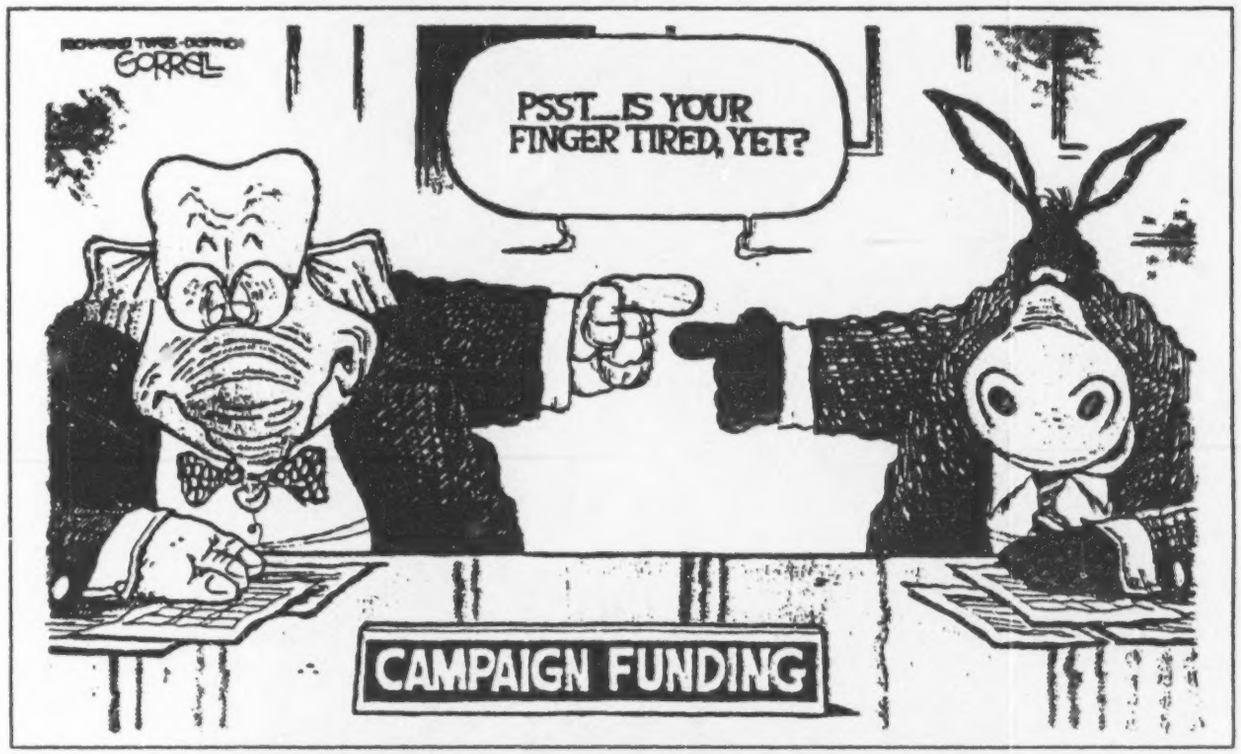
VCU hosted the debate. That would seem to make the event a state-sponsored one. If that is indeed the case, then the organizers should have made sure each candidate who will appear on the ballot received an invitation to participate.

Third parties face many hurdles — some statutory, some not. The catch-22 probably ranks as the highest: Third-party candidates don't get invited to debates and similar public events because they have little chance of winning, and they have little chance of winning partly because they don't get invited to debates and similar public events. Yet poll after poll shows dissatisfaction with the two major parties, suggesting that voters might welcome alternatives if they knew more about them.

It says nothing about the rightness or wrongness of Ms. DeBauch's political views, to say she should have been invited to the debate to let the voters decide for themselves.

Trading Favors

Most Favored Nation trading status means less than the designation implies. It does not mean, for instance, that countries qualifying for MFN rank among America's sweethearts. Rather, it describes a technical condition.



LETTERS TO THE EDITOR 149

National Tests Mean A National Curriculum

EDITOR, TIMES-DISPATCH:

Kudos for William Safire's October 4 column, "Flunk Clinton's Cookie-Cutter Test for This Diverse Nation."

As a former teacher and administrator in Virginia schools, I have found that teachers do "teach to the test." As Safire states, national testing for math and English will inevitably result in national curricula, and not just for those subjects.

Unchecked, Bill Clinton's *Correspondent of the Dar*

Whenever the press or elected officials try to defame the Sierra Club with half-truths and distortions such as these, membership grows and donations increase. With adversaries like the TIMES-DISPATCH, the Sierra Club will continue to be one of the largest, most well-respected environmental organizations in the country for years to come.

RANDY TRUE SLOVIC.
RICHMOND.

Banning Books Isn't A Trivial Issue

EDITOR, TIMES-DISPATCH:

The American Library Association's Banned Books Week is not, as your September 22 editorial ["Banned Books Week"] proclaims, an "annual oddity" ad-

Books are indeed challenged and materials removed from school classrooms and libraries across the country — and in the Richmond area — on a regular basis. As those of us in the schools well know, many decisions regarding school materials are never reported or publicly voted upon, but the end result is the same: the removal or suppression of books and magazines.

While all of us can agree that certainly parents and other concerned citizens are welcome to scrutinize library shelves, the United States Supreme Court has ruled that school libraries cannot be regulated willy-nilly — even by a district school board. It is in support of such decisions that ALA and other concerned organizations welcome the attention

ple to read in school. Yet to chuckle over the statistics publicized during Banned Books Week and to wink at the removal of materials (even the lowly Goosebumps series) trivializes the issue beyond its current gravity.

LEILA CHRISTENBURY.
RICHMOND.

Candidate Sounds Like Doug Gilmore, Jim Clinton

EDITOR, TIMES-DISPATCH:

Jim Gilmore is a good candidate for Governor and I just might vote for him. However, he needs to sound a little less like a Democrat. Let me get this straight: We'll pay fewer taxes (on cars), we'll spend more (4,000 more teachers), but we won't go in debt because the expanding economy will generate

Editorial, "She's Right," Richmond Times-Dispatch 10/11/97 (p. 149)
A162

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

SUE HARRIS DEBAUCHE,	)	
	)	
- Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION**
	)	**NO. 3:97CV770**
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF SUE HARRIS DEBAUCHE

COMMONWEALTH OF VIRGINIA)
)
CITY OF SALEM to wit:)

The undersigned, Sue Harris DeBauche, a resident of the Commonwealth of Virginia, being duly sworn, hereby deposes as follows:

1. I am a resident of the Commonwealth of Virginia and now reside in Moneta, Virginia. This Affidavit is based on

my personal knowledge.

2. I have read the affidavit of Carl E. McNeill, the General Manager of Clear Channel Radio, Inc., t/a/ WRVA ("WRVA"), filed in connection with its motion to dismiss my lawsuit.

3. Mr. McNeill indicates that Debate Virginia was carried out by L. Douglas Wilder as an independent contractor and not by WRVA. He says that WRVA's only role in Debate Virginia was to pick up the audio feed, broadcast the debate and provide the feed to other radio companies. He also indicates that WRVA had no role in choosing the debate participants.

4. From my review of the Appendix which I have previously submitted to the Court (which includes documents produced in response to subpoenas in this case), it is clear to me that WRVA had a greater role in the debate than that stated by Mr. McNeill. For example, the initial April 7, 1997, invitation letter to the candidates, found at pages 031-32 of the Appendix,

states that the invitation to debate was extended "on behalf of WRVA. . . ." G. Bryan Slater, Governor Gilmore's campaign manager, apparently read it that way too when, in reply to Wilder on April 23, 1997, he characterized the debate as being "sponsored by WRVA" and that Governor Wilder or "the appropriate person at WRVA" would be setting the date and arrangements for the event. Appendix 036. On May 7, 1997, Governor Wilder again represented to candidate Gilmore that it was a "WRVA sponsored debate." Appendix 037-8. And then, on July 7, 1997, Governor Wilder again stated to the candidates, among other things, that the debate was being "jointly sponsored by WRVA, WNVT and affiliates and VCU." Appendix 042-3. The facts as seen through Mr. O'Neill's eyes unfortunately do not square with the written historical record of the debate. Unless Governor Wilder is lying, which I have no reason to believe he would do, the initial invitation was made to the candidates "on behalf of WRVA." The other documents in

the Appendix I have submitted also reveal additional "negotiations" took place leading to Debate Virginia with WRVA continuing as a co-sponsor and participant in the event. Appendix 042.

4. Mr. O'Neill's statement as to Governor Wilder's status as an independent contractor states a legal conclusion. Whether he was an independent contractor, or an agent, of WRVA for purposes of the debate, its seems to me, would have to be determined by the trier of fact, just as whether, in excluding me from the debate, he was also acting "on behalf of WRVA."

5. At the moment, WRVA has refused to respond to my discovery to determine the precise facts and circumstances of the relationships between the defendants who co-sponsored the debate, what each of them knew and when, and the precise role each of them played in the debate and its execution. I would hereby request that the Court require the

defendants to respond to the discovery requests I have previously submitted. I would also request the Court to permit me to conduct necessary further discovery, including depositions of Mr. O'Neill, Governor Wilder and other personnel of WRVA and the other defendants, to present facts to rebut and defend against WRVA's motion for summary judgment which I now believe to be premature.

FURTHER YOUR AFFIANT SAITH NAUGHT.

SUE HARRIS DEBAUCHE

SUBSCRIBED AND SWORN before me this 21st day of January 1998.

Christie A. Gibbs
Notary Public

My Commission expires: August 31, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Richmond Division)

SUE HARRIS DEBAUCHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**3:97CV770**
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF WINSTON E. MATHEWS, JR.

COMMONWEALTH OF VIRGINIA)
)
COUNTY OF YORK, to wit:)

The undersigned, Winston E. Mathews, Jr., a resident of the Commonwealth of Virginia, being duly sworn, hereby deposes as follows:

1. I am a resident of Charles City County, Virginia,

and also happen to be a member of the bar in good standing of the Commonwealth of Virginia. This Affidavit is based on my personal knowledge.

2. I live in a rural location in Charles City County and frequently have to drive some distance for shopping, appointments and social gatherings. When I do, I usually listen to WRVA-AM. I like to listen to WRVA because it is a high-power, news-oriented station and makes a concerted effort to be the leading news station in Richmond. Being in the State Capital, WRVA's news coverage is also particularly oriented to Virginia politics and many of its programs include discussion of Virginia political issues. For instance, I am aware that Governor Allen has had a monthly program with WRVA personality, Pam Overstreet, during the years of his Governorship. Likewise, former Governor Wilder has a program once a week focusing primarily on politics and issues of social importance. Political discussions also occur with

regular frequency on talk shows hosted by Jerry Lund, Jim Jacobs and Lou Dean. I have myself been a Republican Party activist (and was at one time a candidate in the Republican Primary for statewide political office) and am aware that politically involved persons in Richmond and in the WRVA listening area listen to WRVA because of its political coverage. These subjects interest me and for that reason I also listen to WRVA on a regular basis.

3. In September 1997, I became aware from listening to WRVA that WRVA was involved in instigating or sponsoring a debate between Gubernatorial candidates, Jim Gilmore and Don Beyer. The way it was presented over the air, it appeared WRVA was one of the main sponsors of the debate and that it was presented as a WRVA semi-exclusive event, that is, it would be aired on other stations, but that WRVA was making the whole event possible. WRVA's promotion was worded in a way that "we're the more important cog in the

wheel, we had something to do with it and if you want to hear it, you should listen to WRVA." In other words, WRVA was taking credit for its importance in making the debate happen. Its promotion of the debate occurred not only on Governor Wilder's show, which is just one evening a week, but at other times during the day including the Lou Dean Newsmaker's Show, the Jerry Lund Show and Jim Jacob's drive time show in the afternoons.

4. I am not related by politics or otherwise to Sue Harris DeBauche and in fact have never met her or heard her speak. I also am not affiliated in any manner with any competitor of WRVA.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Winston E. Mathews, Jr.

SUBSCRIBED AND SWORN before me this 20th day of January 1998.

Jacqueline Coffman
Notary Public

My Commission expires: 6/30/2001

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WILLIAMSBURG, VIRGINIA 23185

FAX: (757) 253-5825

EMAIL: KCLAW@ATTMAIL.COM
WEBSITE: WWW.KCLAWFIRM.COM

July 29, 1998

A173

The Honorable James R. Spencer
United States District Judge
U. S. District Court
for the Eastern District of Virginia
Richmond Division
1000 East Main Street
Richmond, Virginia 23219

Re: Debauche v. VCU et al., Civil Action No. 3:97cv770

Dear Judge Spencer:

At the conclusion of the defendant's argument today on the pending attorney fee motions in this case, the Court indicated it had a jury waiting for its next case and I did not have the opportunity to comment on argument by defendant's counsel. For the record, I did want to correct a statement made by one of the other counsel to the effect that someone is paying for Ms. DeBauche's counsel in this case. I hereby represent as an officer of the Court that none of Ms. DeBauche's counsel has been or is being compensated for their work on her case. From the beginning her case has been handled on a strictly pro bono basis and the attorneys working on the case have considered it, as with certain other work they do, as part of the legal profession's obligation to make the system of justice accessible for persons whose constitutional rights have been violated and would not otherwise have the means to do so.

Very truly yours,

James J. Knicely

jjk/j

cc: R. Hewitt Pate, Esquire (by U. S. Mail)
Robert L. Brooke, Esquire (by U. S. Mail)
Lawrence D. Wilder, Jr., Esquire (by U. S. Mail)
William E. Thro, Esquire (by U. S. Mail)

823

WILDER & GREGORY
ATTORNEYS AT LAW
EIGHTH & MAIN BUILDING
SUITE 1000
707 EAST MAIN STREET
RICHMOND, VIRGINIA 23219

MAILING ADDRESS:
POST OFFICE BOX 518
RICHMOND, VA 23218-0518

TELEPHONE (804) 643-8401
TELECOPIER (804) 648-2707

May 5, 1998

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

A174

James J. Knicely
Knicely & Cotorceanu, P. C.
Post Office Drawer GK
487 McLaws Circle, Suite 2
Williamsburg, Virginia 23185

Re: Sue Harris Debauche v. Virginia Commonwealth University, et al.
Civil Action No. 3:97cv770

Dear Mr. Knicely:

I enclose Lawrence Douglas Wilder's Motion to Dismiss, Memorandum in Support of Motion to Dismiss, Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in the original envelope mailed March 16, 1998. This was returned to our office due to an error on the mailing label.

Please do not hesitate to contact either me or Mr. Wilder if you have any questions.

Sincerely,

Laura M. Hillenbrand

cc: Alison Paige Landry, Esq. (w/o enclosure)
Jack Martin, Esq. (w/o enclosure)
Robert Brooke, Esq. (w/o enclosure)

Letter from Laura M. Hillenbrand to James J. Knicely 5/5/98
(with 5/4/98 attached postmark), and copy of postmarked envelope dated 3/16/98,
marked insufficient address
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A175

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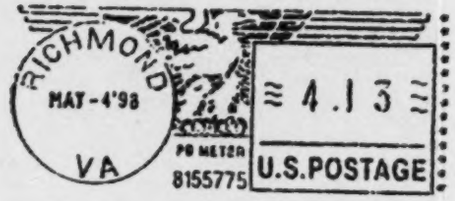
MAIL



FIRST CLASS MAIL

WILDER & GREGORY
ATTORNEYS AT LAW
POST OFFICE BOX 518
RICHMOND, VIRGINIA 23204-0518

TO: James J. Knicely, Esquire
Knicely & Cotorceanu, P.C.
Post Office Drawer GK
487 McLaws Circle, Suite 2
Williamsburg, VA 23185

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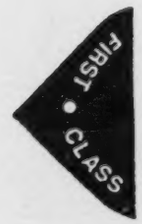

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(with 5/4/98 attached postmark), and copy of postmarked envelope dated 3/16/98,
marked insufficient address
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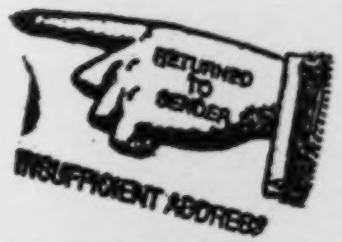

WILDER & GREGORY
ATTORNEYS AT LAW
POST OFFICE BOX 518
RICHMOND, VIRGINIA 23218-0518

TO: James J. Knicely
Knicely & Cotorceanu, P.C.
Post Office Drawer Circle,
Suite 2
Williamsburg, VA 23185

407

Letter from Laura M. Hillenbrand to James J. Knicely 5/5/98
(with 5/4/98 attached postmark), and copy of postmarked envelope dated 3/16/98,
marked insufficient address
A176

Supreme Court, U.S.
FILED
JAN 14 2000
CLERK

No. 99-1009

In The
Supreme Court of the United States

SUE HARRIS DEBAUCHE,

Petitioner,

v.

VIRGINIA COMMONWEALTH UNIVERSITY, a corporation established pursuant to Virginia Code §23-50.4 and an instrumentality of the Commonwealth of Virginia; EUGENE P. TRANI, individually and in his official capacity as President of Virginia Commonwealth University; LAWRENCE DOUGLAS WILDER, in his individual capacity; CLEAR CHANNEL RADIO, INC., t/a WRVA, a Nevada corporation and CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS, INC., t/a WNVT, a Virginia corporation.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Appellate Court appropriately uphold the District Court's ruling dismissing this action against Wilder under Rule 12(b)(6) of the Federal Rules of Civil Procedure for Petitioner's failure to state a claim upon which recovery is allowed by law?

2. Did the Appellate Court err in remanding to the District Court further consideration of the decision to award Wilder attorneys' fees incurred in the defense of Petitioner's meritless action against Wilder as a private party for alleged violation of her constitutional and civil rights?

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STATEMENT OF THE CASE

This case involves a private citizen, Wilder, who in April 1997, in his private individual capacity, invited Mssrs. Donald S. Beyer (hereinafter referred to as "Beyer") and James G. Gilmore (hereinafter referred to as "Gilmore") to join in a debate. (Am. Compl. ¶¶ 25,27, A 89). As of April, 1997, Gilmore and Beyer were the only duly qualified candidates for Governor. Gilmore and Beyer, on October 6th, 1997, debated in a one-time event which came to be known as Debate Virginia. (Am. Compl. ¶ 51, A 97). As to the core decision at issue in this case, the question of invitees, Wilder alone arranged the content of Debate Virginia (Am. Compl. ¶25, A 89). As the sole private invitor and in this individual and personal capacity, Wilder exercised sole discretion regarding the content of the program, namely the identity of the participants. Such decision making regarding choice of speakers was well within Wilder's constitutional prerogative.

Months before Petitioner qualified as the Reform Party candidate, Wilder, acting alone and in his individual capacity, secured basic arrangements regarding the debate with Gilmore and Beyer. (Am. Compl. ¶¶ 24(a) and 25, A 88-89). The agreement between Wilder and Gilmore and Beyer consisted of their commitment to participate in a debate which Wilder would moderate. (Am. Compl. ¶9, A 84) However, the debate had to occur "live" and on a Monday evening between 8:00 and 10:00 p.m. because that was the time slot for Wilder's WRVA radio broadcast. (Am. Comp. ¶ 25, A 89). Having extended invitations to and having secured acceptances from Beyer and Gilmore, Wilder considered other venues for his debate. VCU offered to furnish its facilities and support. (Am. Compl. ¶27, A 89).

In September 1997, DeBauche was certified as the Reform Party candidate for Governor. (Am. Complaint ¶ 19, A 87). Subsequent to that certification, DeBauche alleges that she or persons acting on her behalf attempted to contact

Wilder so as to participate in Debate Virginia. (Am. Compl. ¶¶ 47, 48, 49 and 50, A 96).

There is no allegation that Wilder received Petitioner's communications. There is no allegation that Wilder or anyone else rejected Petitioner's efforts to participate in Debate Virginia. Petitioner merely alleges that Wilder did not return her calls or respond to her alleged requests. (Am. Compl. ¶¶ 47, 48, 49 and 50, A 96). In addition, there are no factual allegations to support Petitioner's allegation of Wilder's alleged intent to exclude Petitioner from Debate Virginia on the basis of her "viewpoint". There are no factual allegations beyond conclusory allegations concerning Wilder's policy, custom and/or practice regarding the regulation of access to, and expression in, designated public fora. Finally, there are no factual allegations in support of Petitioner's contention that Wilder acted under color of state law when he made the deicision regarding the participants in Debate Virginia.

At the District Court level, all parties filed Motions to Dismiss pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure (the "Rules").[1] The District Court granted the motions and dismissed Petitioner's action in its entirety. Petitioner appealed the decision. In a separate Order, the District Court awarded attorneys' fees to Wilder, CVTEC and Clear Channel Communications. This ruling was appealed separately. Both appeals were consolidated before the Fourth Circuit. The Fourth Circuit affirmed the decision on the merits and remanded only the issue of attorneys fees to the District Court for future findings. A 24.

[1] Wilder also filed a Motion for Summary Judgment pursuant to the provisions of Rule 56, but this motion was determined by the District Court to be moot.

ARGUMENT

Reasons for Denying the Writ

First, the District Court's ruling, affirmed by the Fourth Circuit Court of Appeals (the "Fourth Circuit"), that the action brought by Petitioner against the Respondents does not state a claim upon which, as a matter of law, relief can be granted was correct as a matter of law. The position taken by Petitioner does not present this Court with any issues not already decided in Arkansas Educational Television Commission v. Forbes 523 U.S. 666, 118 S. Ct. 1633; 140 L. Ed. 2d 875 (1998). Finally, both the Fourth Circuit and the District Court correctly assessed the factual allegations of Petitioner's amended complaint and determined, despite conclusory allegations to the contrary, that Petitioner did not and cannot plead a cause of action against Wilder, or any other party to this lawsuit. The Petition does not meet the standards set forth in Rule 10 for granting a writ of certiorari because there is no indication of a conflict between the Circuits on an issue of federal or important law, nor is there an indication that the Fourth Circuit failed to correctly apply current law to the facts presented.

Wilder did not seek imposition of attorneys' fees under 42 USC § 1988 against any person other than the Peitioner. Accordingly, Wilder does not take a position on the issue of the Court's finding that such fees may be imposed against the Petitioner's *pro bono* civil rights counsel. Wilder asserts only that this matter should be remanded to the District Court for findings consistent with the Fourth Circuit's opinion on the issue of attorneys fees.

I. THIS PETITION DOES NOT RAISE ANY SIGNIFICANT LEGAL ISSUES NOT PREVIOUSLY DETERMINED BY THIS COURT

Petitioner argues that this is a matter which should be addressed by this court because this is an election year and "because candidate debates are of exceptional significance in the electoral process." Petition for Writ of Certiorari, p. 5. This, however, is exactly why this Court need not address this matter further, as all the issues raised by Petitioner, relevant to candidate debates, those of viewpoint discrimination and access to a public forum, have been previously decided by this Court.

Petitioner describes her case as one which must be decided in light of this Court's ruling in the case of Arkansas Educational Television Commission v. Forbes 523 U.S. 666, 118 S. Ct. 1633; 140 L. Ed. 2d 875 (1998). In light of that characterization, it is Wilder's position that Petitioner's case raises no legal issues not previously decided by this Court with regard to viewpoint discrimination and access to a public forum. In Forbes, this Court determined that the First Amendment of its own force does not compel public broadcasters to allow access to their programming. Further, in Forbes, it was the broadcaster, a state created agency, who was the defendant. None of these decisive factors exist in this case. Further, in Forbes, none of the participants in the debate, the moderator or any of the questioners, were sued. Petitioner is asking this Court, which applied essential principles of Freedom of Speech to a state owned agency in Forbes, to create state action where it does not exist. Forbes neither stands for nor implies the proposition that because candidate debates are important, they rise to the level of state action, which is the only way Petitioner's allegations against Wilder survive any reasonable scrutiny.

II. BOTH THE DISTRICT COURT AND THE FOURTH CIRCUIT WERE CORRECT IN DISMISSING THE PETITIONER'S ACTION AGAINST RESPONDENT WILDER AS THERE WERE NO FACTUAL ASSERTIONS OF STATE ACTION BY WILDER, ONLY CONCLUSORY ALLEGATIONS

In ruling on a motion to dismiss under Rule 12(b)(6) of the Rules, the court need not accept the truth of conclusory allegations of fact. In its consideration of the District Court's ruling dismissing this matter, the Fourth Circuit detailed all the factual allegations of Petitioner's First Amended Complaint. After this analysis, the Fourth Circuit affirmed the ruling of the District Court. In so ruling, the Fourth Circuit stated:

> However th[e] facts [of the first amended complaint] are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action. As distinguished from *Burton*, DeBauche's amended complaint does not describe facts that suggest independence such that VCU relied on the private defendants for its continued viability. While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, their conduct cannot be thought to have controlled his conduct to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we apply *Andrews* to those facts, we conclude that none of the four circumstances that we identified in *Andrews* exists in this case.

DeBauche v. Virginia Commonwealth University, et al, 191 F. 3d 499, ___. A 15-16. [2]

A motion to dismiss should be granted if it appears to a certainty that no relief could be granted under any set of facts which could be proved. However, the court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss. Morse v. Lower Merion School District, 132 F. 3d 902 (3d. Cir. 1997).

The case of Hirsch v. Arthur Anderson, 72 F.3d 1085, 1092, (2d Cir., 1995) held that "conclusory allegations of the legal status of defendant's acts need not be accepted as true for the purposes of ruling on a motion to dismiss." The Hirsch court went on to analyze the factual allegations and underpinnings of the claims made and found that the allegations, despite stated legal conclusions by the claimant otherwise, were not sufficient to state a cause of action. This is exactly what both the District Court and the Fourth Circuit did in this present situation. After a detailed analysis of the factual allegations and underpinnings of Petitioner's Amended Complaint, each of these Courts found that there was a fundamental flaw in the allegations against Wilder. Wilder was not, at the time of the conduct complained of in the Amended Complaint, a state actor and therefore, he could not, as a matter of law, violate the Petitioner's constitutional rights, including those rights described in the Forbes decision, under which Petitioner stakes her entire claim.

An analysis of Petitioner's Amended Complaint reveals that the paragraphs specifically naming Wilder state only that (1) Wilder was an influential figure in Virginia politics; (2) Wilder hosted a talk show on a local radio station; (3) Wilder invited Gilmore and Beyer to discuss issues on that show; (4) Wilder accepted the invitation of VCU to conduct a debate between Gilmore and Beyer on VCU premises; and (5) Wilder failed to return phone calls

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[2] Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993)

and e-mail messages from DeBauche. (Am. Compl. ¶¶ 9, 18, 19, 24(a), 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 46, 47, 48, 49, 50, 82, 83, 84, 94, 95, 96, 97, and 98; A 83,86,96-96,103-106). Armed only with these sparse factual allegations, Petitioner then jumps to the legal conclusion that Wilder acted "jointly" with VCU and all the other respondents and, in so doing, violated Petitioner's alleged constitutional right to participate in Debate Virginia.

The law does not require the District Court or this Court to accept as true these conclusory legal assertions, even while accepting the factual allegations as true for the purposes of notice pleading. Petitioner's claim against Wilder fails as a matter of law as is does not make factual allegations sufficient to support the legal conclusions drawn. Because Petitioner's Amended Complaint fails to state any factual basis for her allegation that Wilder acted "jointly" with the VCU, the District Court and the Fourth Circuit rightfully rejected her legal conclusion that Wilder was a state actor and, thus, could be held liable for any alleged violation of her civil or constitutional rights.

III. AS A PRIVATE PARTY WILDER CANNOT BE LIABLE FOR A VIOLATION OF DEBAUCHE'S CONSTITUTIONAL RIGHTS

In the Amended Complaint, Petitioner states a claim against Wilder in his individual capacity only. Although reference is made in Petitioner's brief to Wilder acting in his capacity as an independent contractor of WRVA and in his capacity as a Distinguished Professor at VCU, Wilder was

not sued in either capacity.[3] At the time Petitioner filed the Amended Complaint, she had all of this information. Nonetheless, the Complaint and the Amended Complaint are identical in their statements of the capacity in which Wilder is sued. The only contention by Petitioner that Wilder was a state actor is her conclusory allegation that Wilder acted jointly with all of the defendants, state actors and private corporations alike, in failing to invite Petitioner to participate in Debate Virginia and failing to return phone calls and other purported communications.

This Court has articulated several tests for establishing state action by a private party. See Lugar v. Edmondson Oil Co., 457 U.S. 922 ; 102 S.Ct. 2744; 73 L. Ed. 2d 482(1982). For a private party to be liable under the "joint action" test, the state must have "so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise". Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58; 95 S. Ct. 449; 42 L.Ed.2d 477 (1974). The state and the private party must be "intertwined in a 'symbiotic relationship'" involving the alleged constitutional violation. National Broadcasting Co. v. Communications Workers of

[3] If the Petitioner is asserting that the actions taken by Wilder were in his role as a Distinguished Professor of the Center for Public Policy at VCU, then Wilder is entitled to the broad protections of academic freedoms. See Sweezy v. New Hampshire, 354 U.S. 234, 250; 77 S.Ct. 1203, 1211 (1957) in which the court stated "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." See also Keyishian v. The Board of Regents of the University of the State of New York 385 U.S. 589, 87 S.Ct. 675 (1966) in which the court stated "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."

America, 860 F.2d 1022, 1027 (11th Cir. 1988) (quoting Jackson, 419 U.S. at 357).

As stated above, the Fourth Circuit found that Trani,[4] could not be thought, based upon the factual allegations of Petitioner's 100-plus paragraph Amended Complaint, to have controlled Wilder's conduct to such an extent that his actions amounted to a surrogacy for state action. It is this level of control which is required before a party can bring an action against an otherwise private party for violation of Constitutional and Civil Rights.

The Fourth Circuit has held that where there is no "ongoing management and control" of a public facility used by a private party for a one-time event, such "intertwining" will rarely, if ever, be found. UAW, LOCAL 5285 v. Gaston Festivals, 43 F.3d 902, 908 (4th Cir. 1995) (quoting Evans v. Newton, 382 U.S. 296, 301 (1966)) (no state action involved in one-day use of public property for local festival). Petitioner does not point out a conflict in the circuits on this issue. Accordingly, there is no basis for granting the writ.

In the case of Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993), the Fourth Circuit articulated a test by which it can be determined whether a private party can be a state actor. The court found that a private party may be held liable for violations of Constitutional and Civil Rights in only four contexts: (1) when the state coerced the private actor to commit acts that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; and (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. The Fourth Circuit having specifically considered the possible applicability of each of these four

[4] Petitioner has not appealed the District Court's ruling dismissing VCU from this action.

situations rejected the Petitioner's position that Wilder's conduct rises to the level of state action allowing her to state a claim against him for the violation of her Constitutional rights.

The allegation that a party is a state actor is a legal conclusion, which a court is not bound to accept in ruling on a motion to dismiss. . See Flagg Bros. v. Drash, 436 U.S. 149; 98 S.Ct. 1729; 56 L. Ed. 2d 185 ; (1978) (in which the Court upheld a district court's dismissal of an action under Rule 12 (b)(6) for failure to state a claim of state action); Koltz v. Bezmen, 822 F. Supp. 114, 117 (E.D.N.Y. 1993) (granting motion to dismiss complaint against private party because only allegations of collaboration with state defendant were "conclusory" vague or general"); Carter v. Norfolk Community Hospital Assoc., Inc., 761 F.2d 970 (4th Cir. 1985) (granting motion to dismiss where private party's conduct did not involve state action). A court may find state action only where there are sufficient specific allegations of fact to permit it to reach that conclusion for itself. Petitioner has failed, even after amending her initial Complaint with a 100- page plus appendix to the Amended Complaint, to substantiate such an allegation.

It is self-evident that "the constitutional guarantee of free speech is a guarantee only against abridgment by government". Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Watts-Mean v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993). The lines drawn by state action "permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law". Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991). Neither free speech nor equal protection erect a shield against merely private conduct. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "Careful adherence to the state action requirement preserves an area of individual freedom by limiting the reach of federal law and avoids the imposition of responsibility on a State for conduct it could not control. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S.

180, 191 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922 at 936-937).

Wilder did not decide not to include Petitioner in Debate Virginia. The participants in Debate Virginia were determined months before Petitioner was ballot qualified. There are no factual allegations that any of the sate actors named here, or any other state actor, controlled Wilder's conduct such that his actions amounted to a surrogacy for state action or that the state actors insinuated themselves with Wilder's decision as to who would be invited to Debate Virginia. The only allegation that Wilder was in any way a "state actor" is the conclusion that he acted jointly with all of the other defendants, including VCU, each purportedly a state actor for the purposes of Petitioner's claims.

A. If Wilder Is Not A State Actor, He Cannot Be Liable for Violation of DeBauche's Constitutional Rights

The First Amendment does not require speakers who use public property to include in their expressive activities the messages of others. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995); Sistrunk v. City of Strongville, 99 F.3d 194 (6th Cir. 1996), *cert denied*, 117 S. Ct. 2409 (1997); United Auto Workers v. Gatson Festivals Inc., 43 F.3d 902 (4th Cir 1995). In the claims against Wilder, the Petitioner is seeking to force Wilder, because he used public property, to associate with Petitioner against his will.

Although the First Amendment guarantees access to public facilities previously designated for expressive activities, it also states that access shall not be denied because the state disagrees with the viewpoint of any speaker or message. In this case, Petitioner was offered equal access to VCU's Performing Arts Center and was offered the same resources that VCU made available to Wilder and Debate Virginia. (JA100-102). Petitioner declined this offer,

insisting that the entire Debate Virginia be re-created for her benefit. It is evident from the nature of this demand that Petitioner sought something far more accommodating than mere nondiscriminatory access to public facilities. Rather, Petitioner sought the right to confront and contemporaneously express her message and to thereby dilute the message of her competitors in the political marketplace of ideas and, further, to force Wilder, a private citizen, to include her message in his presentation.

Petitioner argues that including her in Debate Virginia would have better informed the electorate about its choices; however, an "audience edification test" does not pre-empt the First Amendment nor is "good cause" or "right of reply" a justification for encroachments on private expression. This Court in Forbes did not recognize such a test. Essentially, Petitioner is inviting this Court to carve out a "political debate" exception to Hurley. But political debates are not unlike other kinds of meetings, social gatherings, educational programs or symposia. Debates are simply a formal opportunity for the exchange of ideas. The fact that speakers in a debate may be highly visible or influential individuals does not alter the governing principles of the First Amendment. Politicians seeking public office and private citizens who arrange debates between candidates for public office should not receive diminished First Amendment rights simply because they use public facilities to facilitate such dialogue. Citizens may use university resources to facilitate their own "political parade", yet at the same time, maintain the integrity and clarity of their message and associations. As long as the state permits others to "have their parade" as well, the First Amendment is not offended.

The fact that Petitioner was offered an opportunity to use the same state facilities and resources offered to her competitors, yet could not galvanize any significant popular support even after such resources were made available to her, amply demonstrates that she seeks to draw upon Wilder

and her opponents' visibility to enhance, rather than merely to convey, her message. This "positive associational glow" was precisely what animated the bisexual coalition to seek access to the traditionalist veterans' parade in Boston. The gay rights activists in Hurley, like the Petitioner, sought to be positively associated with the populist message of the Irish parade and to broaden that message within the same expressive medium. That may be a laudable intention, but constitutionally, state intervention to alter another's expression to render that message more acceptable is a "decidedly fatal objective". Hurley, 515 U.S. at 562, 115 S. Ct. at 2350.

B. Only if Wilder Was Acting As A Public Broadcaster As Defined in the Forbes Decision, Could He Be Held Liable for Violation of DeBauche's Constitutional Rights

There is no allegation in Petitioner's pleadings or assertions in her briefs that Wilder was associated with CVETC, the public broadcaster in this action. However, in the arena of "public" broadcasting, this Court addressed this issue in Forbes. In its decision, this Court held that the public television station's viewpoint-neutral decision to not allow a "marginal" candidate to appear on a televised debate passed constitutional muster. This Court went on to discuss the distinction between private and public broadcasters with regard to access. Justice Kennedy, writing on behalf of the majority, stated:

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions

> rooted in sound journalistic judgment can often be characterized as view-point based. . . . Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its cirrocumuli, a broadcaster by its nature will facilitate the expression of some viewpoint instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

Id. at p. 1639.

This is exactly what Petitioner is asking this Court to do. If Wilder was acting jointly with WRVA, a private broadcasting entity, he cannot be held to a higher constitutional standard than that entity. The only way, under Forbes that Wilder could be held liable for the violation of Petitioner's constitutional rights was to be acting as a public broadcaster, under the scenario envisioned by Forbes. This was not the case, is not the case and was not pleaded as being the case. As such, Wilder cannot be liable for the viewpoint discrimination with which the Petitioner charges him and the lower Courts are correct in their evaluation of Petitioner's amended complaint.

C. The Utter Lack of Legal Support for DeBauche's Claims Against Wilder Warrants Payment of Attorneys' Fees and the Decision of the Fourth Circuit to Remand that Issue to the District Court Should be Upheld

Title 42 U.S.C. §1988 states that in a §1983 action, the court in its discretion, may allow the prevailing party…a

reasonable attorney's fee as part of the costs". Citing Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978), the District Court construed §1988 to mean that a defendant is entitled to a fee award where the action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith".

The lower courts determined that Wilder alone decided to invite only Gilmore and Beyer. The lower courts further determined that Wilder had a First Amendment right to do so and not include Petitioner in Debate Virginia even if the debate occurred on the grounds of a state university. Wilder did not seek a ruling that the attorneys' fees to which he is entitled under 42 U.S.C. § 1988 should be imposed against the Petitioner's counsel. Thus, Wilder did not take a position in the Fourth Circuit Court of Appeals nor does he take position in this Court as to whether the fees should be awarded jointly and severally against Petitioner and her *pro bono* counsel.

Petitioner argues that discovery and a trial should be held in order to determine whether her case is unreasonable or without foundation. However, further discovery by Petitioner cannot elevate her case above the pleadings set forth in her Amended Complaint. Petitioner admits that Wilder acted as a private individual in inviting Beyer and Gilmore to participate in Debate Virginia. Moreover, the lower Courts correctly found that Petitioner failed to allege facts sufficient to demonstrate that Wilder was a state actor. Permitting Petitioner further discovery and a trial cannot cure the deficiencies of Petitioner's Amended Complaint. The only result of additional discovery and trial is the needless increase to the defendants in attorneys' fees and costs of which Petitioner already complains to be unreasonable.

The issue before this Court is not whether Petitioner *can* bring a claim of viewpoint discrimination but whether both lower courts were correct in its ruling that she failed to

allege properly a case of viewpoint discrimination, even after the opportunity to amend the complaint was taken subsequent to obtaining campaign documents. Insofar as Petitioner failed to set forth a reasonable claim against *any* of the defendants and to the extent she seeks to intrude upon Wilder's First Amendment rights, she should be responsible for Wilder's attorneys' fees and costs.[5]

CONCLUSION

Respondent Lawrence Douglas Wilder respectfully requests that this Court deny Petitioner's request for a Writ of Certiorari and that this matter be remanded to the District Court on the issue of attorneys' fee for findings consistent with the ruling of the Fourth Circuit Court of Appeals.

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[5] The Petitioner alleges that Wilder is not entitled to attorneys fees under 42 USC § 1988 because she was unaware of Wilder's motion. to dismiss or in the alternative for summary judgment. However, this issue was raised by the Petitioner at the appellate level and rejected.

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FILED
FEB 14 2000
CLERK

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EUGENE P. TRANI, et al.,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), private citizens engaged in speech may exclude, from their events, messages they do not wish to make, even when those events are held on public property. The debate at issue here was held at a public university, but the selection of participants was made by a private citizen. Was the Fourth Circuit correct when it concluded that the university president had no constitutional duty to insist that the petitioner be included as a participant?

2. The petitioner contends that the university president violated her First Amendment rights under *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), because she was not included in the debate held at his institution. Assuming *arguendo* that this is so, was the Fourth Circuit correct when it concluded that the president, in his individual capacity, is entitled to qualified immunity?

3. *Ex parte Young*, 209 U.S. 123 (1908), allows an injunction against a state official only when there is a continuing violation of federal law. The petitioner alleged only an isolated violation, not a continuing one. Was the Fourth Circuit correct when it ruled that, under such circumstances, the doctrine of *Ex parte Young* does not apply?

QUESTIONS PRESENTED – Continued

4. Given petitioner's failure to allege a continuing violation, the availability of qualified immunity and the unlikelihood that the events alleged will be repeated, is this case moot?

[The petition for writ of certiorari also raises issues relating to the award of legal fees against her and her counsel. Those issues do not affect this respondent.]

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BRIEF OF EUGENE P. TRANI, PRESIDENT OF VIRGINIA COMMONWEALTH UNIVERSITY, IN OPPOSITION

Respondent, Dr. Eugene P. Trani, President of Virginia Commonwealth University, respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

Petitioner attempts to invoke *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). But, this case is not about a *government* decision to limit participation in a debate. It is about the right of *private* parties to determine the content of their own messages even when delivered from a public stage. It is not governed by *Forbes*, but by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). Even if *Forbes* were controlling, the record would not permit the inference that the petitioner was excluded because of her viewpoint. Moreover, *Forbes* was not decided until after the events that transpired here. Thus, this respondent is entitled to qualified immunity, as the Fourth Circuit correctly decided. This respondent also has sovereign immunity under the Eleventh Amendment, especially since no ongoing constitutional violation is alleged. If these are not sufficient reasons to deny the writ, this case – which was moot the day it was filed – continues to be a hopelessly moot request for an advisory opinion about the past actions of a state official.

STATEMENT OF THE CASE

In her Statement of the Case, the petitioner, Sue Harris DeBauche, omits several significant facts that appear in her amended complaint or in the voluminous materials submitted by her to the district court in opposition to the motion to dismiss.[1] Those facts show that the choice of participants in the debate was not made by government and, in any event, the choice was made long before DeBauche made her belated entry into the gubernatorial race. A. 88-89. Additionally, DeBauche was offered use of the same university resources that were made available to the candidates of the two major parties. A. 156. She chose to decline them.

A former Governor of Virginia,[2] L. Douglas Wilder spoke to public issues in 1997 from his radio program on WRVA, a major radio station in Richmond. In the spring of that year, Wilder invited the Republican and Democratic gubernatorial candidates – Jim Gilmore[3] and Don Beyer[4] – to appear in a debate to be held in October, 1997.

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[1] The petitioner submitted more than 100 pages of documents to the district court and has included portions of those materials in the Appendix, Volume II.

[2] Governor Wilder served as chief executive of the Commonwealth from 1990-1994, where he acquired national prominence, *inter alia*, as the first African-American to serve as the Governor of any State.

[3] Jim Gilmore was elected Attorney General of Virginia in 1993. He was unopposed for the 1997 Republican gubernatorial nomination.

[4] Don Beyer was elected Lt. Governor of Virginia in 1989 and in 1993. He was unopposed for the 1997 Democratic gubernatorial nomination.

The proposal called for the debate to be moderated by the former Governor and broadcast by WRVA. The two invited guests agreed and the debate was set. At this time, DeBauche was not a candidate. A. 87, 88.

Although there was agreement about the participants in the debate, other details still had to be arranged, including the location. By July 7, 1997, the three principals – Wilder, Gilmore and Beyer – agreed to hold the debate at Virginia Commonwealth University ("VCU"), a public university where the former Governor serves as a Distinguished Professor. VCU agreed to serve as a "sponsor" of the event – dubbed "Debate Virginia" – but, like the sponsors of most broadcast programs, VCU did not attempt to control program content. Moreover, the chief decision about content – the identity of the debate participants – had already been made without any involvement by VCU or its President, Eugene P. Trani. At the time VCU agreed to serve as sponsor, DeBauche was still not a candidate. A. 87.

As planning for the debate proceeded, the Reform Party was in turmoil. Its original candidate for governor was nominated in early June, 1997, but resigned that nomination later that same month. No replacement was found. In August, the Reform Party sought to entice Wilder to accept its nomination. He declined. Finally, in mid-September, DeBauche decided that she would run and the Reform Party gave her its nomination. This was her first bid for public office. By any objective standard, her candidacy was hopelessly belated. Yet, given the showing by its 1996 presidential candidate, Ross Perot, the Reform Party was entitled to a place on the ballot in 1997 without any need for its nominee to accumulate

signatures of support on petitions. Va. Code §§ 24.2-101 and 24.2-511(D).[5] Thus, despite her late entry into the race, DeBauche was "ballot eligible" and her name was placed on the November ballot.

Nominated on or about September 14, 1997, DeBauche wanted to be added as a participant in the debate, scheduled for October 6, and attempted to communicate that desire by telephone messages and e-mails directed to Wilder and to the VCU website. She did not, however, attempt to direct any such communication to Trani. Moreover, any decision to add debate participants was not the prerogative of VCU or Trani, but was the prerogative of the three principals – Wilder, Gilmore and Beyer – who were jointly bringing the program to VCU.

The debate went forward on October 6, as planned, with former Governor Wilder moderating the exchange between the two leading gubernatorial candidates, Gilmore and Beyer. DeBauche filed suit on October 15. On October 21, two weeks after the debate had come and gone, DeBauche finally wrote to Trani. She demanded that he "sponsor and manage" another debate for her benefit and requested that he "have Douglas Wilder moderate the debate" and that Trani "use the same amount of resources" as were used in the debate on October 6.

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[5] Virginia Code § 24.2-101 gave the Reform Party the rights of a "political party" because, in one of the "two preceding statewide general elections," its candidate "received at least ten percent of the total vote cast for [a] statewide office." Under Va. Code § 24.2-511(D), those rights include the right to automatic ballot access for party nominees without any requirement for the circulation of a petition.

Trani responded by attempting to correct DeBauche's misunderstanding about the role played by VCU and by offering her the same VCU resources that had been made available to the other candidates. In his letter to her of October 23, 1997, he stated:

> With all due respect you simply misunderstand the role played by VCU in connection with the debate. VCU often makes its facilities available for use in connection with events of probable interest to the university community or the public at-large. Our efforts to accommodate such events does not make VCU responsible for the choice of speakers or the content of their remarks.
>
> While we must decline your request that VCU sponsor a three-way gubernatorial debate between now and Election Day, you may wish to consider using the VCU Performing Arts Center or other VCU resources (e.g. VCU website, 1-800 tollfree number) in connection with an event for your own campaign, including any debate you may arrange with any other candidate. We will make every appropriate effort to accommodate any such request.

A 156.

DeBauche declined Trani's offer. The gubernatorial election was held on November 4, 1997. Gilmore won. DeBauche received less than 2% of the vote. On November 26, 1997, DeBauche amended her complaint, now claiming that, because she had not been included in the debate, the results of the election should be set aside.

The district court dismissed her case on April 13, 1998. It ruled, *inter alia*, that: (i) DeBauche failed to establish that her exclusion from the debate was a result of state action; (ii) DeBauche had no constitutional right to infringe upon Wilder's associational rights; (iii) Trani was entitled to qualified immunity; (iv) Trani in his official capacity was immune from suit under the Eleventh Amendment; and (v) *Ex parte Young* furnished no basis to sue Trani for prospective relief. DeBauche appealed to the Fourth Circuit, which also ruled against her. It held that: (i) the petitioner failed to state a viable theory of state action against Trani; (ii) Trani was entitled to qualified immunity; and (iii) since no ongoing violation of federal law was alleged, *Ex parte Young*, was not applicable to Trani. A.9 and 12-17. Although neither court adopted Trani's mootness argument, it remains a viable alternative basis by which to dispose of this case.

REASONS FOR DENYING THE WRIT

Petitioner offers no compelling reason for granting a writ of certiorari. This case does not involve a conflict among the circuits, nor has the court of appeals decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. Rule 10(a). Indeed, the petitioner makes no attempt to invoke either of these familiar reasons for granting certiorari. Instead, her primary charge appears to be that the court of appeals misapplied a rule set down by this Court in *Forbes, supra*, 523 U.S. 666 (1998). Such a basis for certiorari is "rarely granted" in any case. Sup. Ct. Rule 10. It is entirely inappropriate here because there was no misapplication of *Forbes*. This case is not about a government

decision to limit participation in a political debate. It is about the right of private parties to control their own messages even when delivered from a public stage. Thus, the case is not governed by *Forbes*, but by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (unanimous decision) (upholding First Amendment right of Irish parade organizers to exclude a competing Irish group even though parade used public streets, police escort, and other public resources).

But even if this case were controlled by *Forbes*, the record – indeed, the face of the complaint – forecloses any inference that the petitioner was excluded from the debate because of her viewpoint. A. 89. When DeBauche finally became a candidate at the eleventh hour, it gave her no constitutional right to disrupt the debate plans that had been made months earlier.[6] *Forbes* should not be confused with *Waiting for Godot*.

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[6] Petitioner says that she should have been allowed to take additional discovery, though it is not clear how such discovery could have repaired the defect in the face of her complaint. Moreover, she had already obtained more than 100 documents through the use of *subpoena duces tecum* and had submitted them to the district court as part of her response to the motion to dismiss. That material further undermined her claim of viewpoint discrimination. The district court's decision to stay further discovery on January 26, 1998, was well within its discretion to manage the discovery process. The assertion of sovereign immunity and qualified immunity are legitimate bases on which to stay discovery. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, not even the petitioner claims that decision "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10.

But even if an inference of viewpoint discrimination could be reached, Trani was still entitled to qualified immunity, as the court of appeals found. *Forbes* was not decided until after the 1997 gubernatorial campaign had ended. Before that decision, it was not clear how the constitutional rights of political candidates intersected with the authority of government actors to organize debates. Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Trani is entitled to qualified immunity. Any monetary recovery from him in his individual capacity is foreclosed.

Sovereign immunity is also available. Under *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity precludes monetary awards against state officials in their official capacities. Sovereign immunity can be pierced and an *injunction* entered, but even injunctive relief requires an ongoing violation of federal law. *Green v. Mansour*, 474 U.S. 64 (1985). Here there was no continuing course of conduct, only a single debate that had already ended.

Finally, petitioner's case suffers the additional defect of being moot. She is barred from any relief by the doctrines of qualified and sovereign immunity. Moreover, her case does not fit into the narrow category of being "capable of repetition yet evading review." *Los Angeles v. Lyons*, 461 U.S. 95 (1983). Even if one assumes that DeBauche will again seek public office, it is simply too far a stretch to assume that, when she does so, VCU will host a debate from which she will be excluded.

In sum, petitioner's request for certiorari is wholly without merit. Her petition should be denied.

I. The Choice of Speakers Was Not State Action.

The first defect in DeBauche's complaint against Trani is her failure to make a well-pled allegation of state action. This defect has two parts. First, she does not allege that Trani made the choice of debate participants. As her amended complaint concedes, this was a decision made by Wilder well before VCU became involved with the debate. A. 89. Second, she misunderstands the meaning of state action when she seeks to transform Wilder's private invitation into a government decision for which Trani could be held accountable. Such a transformation occurred, she theorizes, when Trani permitted access to VCU's facilities for the debate. She is simply wrong on the law. Not only does her theory fall short of alleging state action, it ignores the state's real duty here: to steer clear of "gerrymandering" the content of private speech that happens to take place on public property.

Stripped of any varnish, the petitioner's theory is that, because VCU hosted the debate and promoted it to a highly interested public, VCU – and Trani – are responsible for the content of the program. It is, however, well-established that "[m]ere approval of or acquiescence in the initiatives of a private party is [an insufficient basis for a finding of state action.]" *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The support made available to the debate by VCU, whether the stage and lights, phone lines or student volunteers, is an insufficient basis on which to find that the content of the program was state action. Were it otherwise, then the use of city streets and police in *Hurley* would have made the City of Boston – rather

than the private organization – responsible for excluding gay Irishmen from that parade.

Simply put, state action is not measured by the pound. What is required is a functional analysis of what happened and who made it happen. The salient question is not how much Trani did to support the debate, but whether he was responsible for the conduct complained of, *i.e.*, the omission of DeBauche. As the Fourth Circuit recognized, the petitioner failed to allege that Trani played any role in Wilder's choice of speakers.[7] Since Trani had no authority to invite or reject speakers, the question of whether there was state action in that decision is foreclosed. How VCU may have promoted the debate after the participants were determined is simply irrelevant to that question.

To be sure, the petitioner might have pled a more promising case if VCU made its facilities available to Gilmore and Beyer, yet denied DeBauche access to those same university resources. This is not, however, the case she has pled nor could she have done so. As the record shows, Trani expressly offered her use of the VCU Performing Arts Center (where the debate was held) or "other VCU resources (e.g. VCU website, 1-800 toll free number) in connection with an event for [her] own campaign." A. 156. It was an offer she declined.

Finally, petitioner's hope that she might yet uncover hidden pathways of state action cannot substitute for a threshold factual allegation that any such governmental

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[7] *Compare, e.g.*, ¶¶ 20 and 25 of the amended complaint, A. 89.

action was, in fact, the cause or basis of her exclusion from the debate. *See NBC v. Communication Workers of Am.*, 860 F.2d 1022, 1025, 1026 (11th Cir. 1988) (No state action in NBC's exclusion from convention center because "City . . . neither encouraged nor coerced the exclusion of NBC" and "did not attempt to demonstrate that the city entered into the decision-making process which resulted in the decision to exclude NBC."). The Fourth Circuit correctly concluded that, since there was no factual allegation that DeBauche's exclusion was the result of actions by Trani, what additional facts DeBauche may have gleaned from further discovery about VCU's promotion of the debate was irrelevant.

II. The Choice of Speakers Was Not Viewpoint Discrimination.

Since Trani did not make the decision about which speakers to invite, he cannot be guilty of viewpoint discrimination. The Court need go no further. There are, however, at least three additional points that reinforce the conclusion that no viewpoint discrimination occurred.

First, as shown by the amended complaint, the arrangements for the debate – including the choice of participants – were completed five months before DeBauche became a candidate. A. 89. She was not the target of viewpoint discrimination. She was not even on the radar screen.

Second, while she was the only "ballot eligible" candidate not to take part in the debate, she was also the only one who waited so long to enter the race. *If* there had been another late entrant, and *if* he or she had been

invited to participate while DeBauche was left out, her case for discrimination might have been stronger. But those are not the facts here.[8]

Third, what the petitioner seems to argue is that Trani should have used his position with VCU to compel Wilder, Gilmore and Beyer to include her on their program. One problem with this theory is that there is no allegation that she directed any pre-debate communications to Trani. But, even had she done so, her theory would still fail. For Trani to force private speakers to accommodate another on their program would not have avoided constitutional problems; it would have created them.

Wilder's desire to produce and moderate a debate only between Gilmore and Beyer was well within his constitutional prerogative, as was the desire of Gilmore and Beyer to limit the event to one in which their speaking time and messages would not be diluted by a third candidate. Trani was not constitutionally entitled to compel Wilder, Beyer or Gilmore to associate with DeBauche merely because VCU made its campus and resources available to facilitate the debate. As the district court correctly observed, such compulsion may have seriously infringed on free speech and associational rights. A. 47.

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[8] Moreover, under *Forbes*, there is no obligation to treat all "ballot eligible" candidates the same. Where public officials sponsor a debate, they are entitled to make good faith, informed judgments about the newsworthiness of individual candidates. The very belated candidacy of an individual with no previous record of public office is probably not so newsworthy as to require inclusion even under *Forbes*.

See also opinion of court of appeals, A. 17. Giving petitioner a "right to march in someone else's parade" would have seriously undermined free speech values and the associational liberties of private citizens who use public venues for expressive activities. *Hurley*, 515 U.S. 557.

The activists who demanded access to the parade in *Hurley* sought to be associated with the popular Irish message of that parade and to graft their own message into the message of others. As this Court recognized, state intervention to alter private expression so as to render that expression more "acceptable" is a "decidedly fatal objective." *Hurley*, 515 U.S. at 579. The same is true here. The petitioner had no right to demand a seat alongside Wilder, Gilmore and Beyer, or to draw upon their visibility or popularity to enhance her own message.

As President of VCU, Trani's role in this case was not unlike the mayor of an "academic city" which issues "parade" permits. Diverse "parade" organizers seek to use university resources, whether it be for convocations, speakers' bureaus, symposia, workshops, town meetings, speeches, artistic exhibitions or political debates. Just as a city and its mayor cannot interfere with the parade organizers' decisions to include or exclude certain contingents, *Hurley*, 515 U.S. at 557, neither VCU nor Trani could interfere with Wilder's, Beyer's or Gilmore's choice to include or exclude certain persons from participating in their program.

DeBauche's demand for "contemporaneous equal access" is similar to what this Court sometimes refers to as "coerced access," a highly suspect demand regardless of the nature of the expressive medium or activity

involved. See, *Hurley*, 515 U.S. at 576; *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (invalidating coerced access to the envelopes of a private utility's bill); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a newspaper's choices of material, its decisions regarding size, content and treatment of public issues, fair or unfair, constitute free expression upon which the state may not intrude.) Under DeBauche's theory, the Christian student journalists in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), would have enjoyed the right to publish evangelical sentiments on the same pages as secular publications such as the "Yellow Journal" and to compete directly in the marketplace of ideas by conjoining and co-opting the journalistic messages of their competitors. DeBauche's theory, as applied to *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), would mean that the community group who sought to show a James Dobson film on parenting would have enjoyed the right to exhibit and discuss the film in the middle of a Planned Parenthood meeting. That is precisely what *Hurley* and the First Amendment prohibit.

III. Dr. Trani is Entitled to Qualified Immunity.

If a public official's conduct is alleged to violate the Constitution, he is entitled to qualified immunity if the applicable constitutional standard was not well-settled at the time the conduct occurred. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As Trani has already shown, his conduct in connection with the debate could be deemed unconstitutional only by a radical and unforeseeable change in

First Amendment jurisprudence. *See supra* at 9-14. Although the petitioner struggles to bring this case under the precedent of *Forbes*, that case does her no good. *Forbes* was not decided until 1998, the year after the events in question. *Forbes* holds that a public television station may exclude a political candidate based on its view that he was "non-newsworthy." There is nothing in *Forbes* to suggest that a more restrictive rule would apply to a public university, even if that university were responsible for the exclusion. Even less does *Forbes* weigh against Trani, who made no such decision to exclude. But even if *Forbes* could be read against Trani, the Court in that case was divided. "If judges disagree on a constitutional question, it is unfair to subject [Dr. Trani] to money damages merely for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, ___, 119 S. Ct. 1692, 1701 (1999). While President Trani can be expected to abide by clearly established and well-settled law, he cannot be expected to divine the outcome of Supreme Court decisions that are announced months after he acts. To suggest otherwise is to require every public official to consult a legally accurate crystal ball.

The petitioner's argument against qualified immunity consists largely of her assertions that this case is controlled by *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Neither of these cases involved a demand by a speaker to "piggyback" his or her message onto the opposing message of another. Both involved an entirely separate issue of equal

access to channels of communication controlled by government as employer. In both cases, plaintiffs lost.

In sum, assuming *arguendo* that Trani played a role in the exclusion of the petitioner, the Fourth Circuit rightly concluded that such exclusion did not violate clearly established law and that Trani is entitled to qualified immunity.

IV. Dr. Trani Is Entitled to Sovereign Immunity.

Because Trani in his official capacity is entitled to Eleventh Amendment immunity, petitioner's only hope of keeping him in this action was to invoke the exception to immunity found in *Ex parte Young*, 209 U.S. 123 (1908). Both the district court and the Fourth Circuit correctly perceived, however, that the exception does not apply here since Trani is not alleged to be currently engaged in any unlawful activity requiring federal intervention. The Fourth Circuit was correct when it noted that,

> In her amended complaint, DeBauche alleged that Trani conspired to keep her out of Debate Virginia in 1997 and that the defendants, including Trani, 'will either individually or jointly sponsor, plan, promote, manage or hold statewide debates in the future from which candidates of the [Virginia Reform] Party will be excluded and to which only Democratic and Republican candidates will be invited.' While we must, at this motion-to-dismiss stage of the case, accept as true the allegations of DeBauche's complaint, *see Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), her allegations that she or Reform Party candidates will be excluded from future debates do not, as a matter of law, allege

> an ongoing violation of federally-protected rights. Instead, they amount to conjecture regarding discrete future events. **Mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing violation.** Accordingly, DeBauche's claim against Trani in his official capacity does not fall within the *Ex parte Young* exception, and we have no reason not to apply the traditional principles of Eleventh Amendment immunity to dismiss the claims against Trani in his official capacity.

A. 9, 10 (emphasis added).

Petitioner's only response to this logic is to suggest that *Green v. Mansour*, 474 U.S. 64 (1985), does not preclude declaratory relief for past violations of federal law. Pet. 22-23. Petitioner simply misreads the facts of that case. *Green v. Mansour* involved a class litigants' unsuccessful attempt to obtain, among other things, declaratory relief to the effect that Michigan officials had misapplied federal law in the past. *Id.* at 69. This Court, balancing the Eleventh Amendment and the Supremacy Clause, recognized that, in the absence of a continuing violation of federal law, even "notice relief" – a benign kind of declaratory relief sought by petitioners in *Mansour* – had the same practical effect for purposes of the Eleventh Amendment as an award of damages. Therefore, such declaratory relief constituted an improper exercise of federal judicial power under the Eleventh Amendment. *Id.* at 73.

V. This Case is Moot.

Finally, DeBauche's demand that she be permitted to participate in an already-concluded political debate is a claim that was moot upon filing in the district court, was moot upon appeal, and remains to this day, stale, incapable of redress, and hopelessly abstract. Petitioner demands, in essence, an advisory opinion from this Court as to whether she should be included in future political debates. The Fourth Circuit correctly ruled that, since no ongoing violation of federal law was alleged, *Ex parte Young* was not applicable to Trani. It also held that Trani was entitled to qualified immunity. A. 9 and 12-17. With no relief available to her, there is no actual case or controversy. Nor can this case be deemed "capable of repetition yet evading review." Assuming *arguendo* that she is likely to run for public office once again, there is no basis to conclude that VCU is likely to host another debate in the same year as her campaign and for her particular race, and that she would again be so late to enter the contest as to result in the last minute frenzy – and belated lawsuit – that characterized her actions here. Under the general principles articulated in *Los Angeles v. Lyons*, 401 U.S. 95 (1983), this case is moot.

CONCLUSION

Governor Wilder's purpose in organizing and moderating Debate Virginia was to highlight and compare the views of Jim Gilmore and Don Beyer, two gubernatorial candidates. In so doing, he was not carrying out a traditional governmental function, nor did the debate become

a limited public forum when the program found a stage at VCU. Not to reconfigure the debate to accommodate DeBauche's belated candidacy violated no known principle of the First Amendment. Trani offered DeBauche the same use of university resources that VCU made available to the other candidates. The Constitution requires no more. The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 14, 2000

MOTION FILED
FEB 14 2000

(7)

No. 99-1009

IN THE

Supreme Court of the United States

SUE HARRIS DEBAUCHE

Petitioner,

v.

EUGENE TRANI, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE APPLESEED ELECTORAL REFORM LAW PROJECT, THE COALITION ON FREE AND OPEN ELECTIONS AND THE CENTER FOR VOTING AND DEMOCRACY, IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The Appleseed Electoral Reform Law Project, the Coalition on Free and Open Elections and the Center for Voting and Democracy hereby respectfully move the Honorable Court for leave to file the following brief amici curiae in this case. The consent of counsel for Petitioner has been obtained. The consent of counsel for Respondent Eugene Trani has also been obtained. The consent of counsel for Respondent Lawrence Douglas Wilder has been requested and refused. The consent of counsel for Respondent Central Virginia Educational Telecommunications Corporation and the consent of counsel for Respondent Clear Channel Radio have been requested and refused.[1]

The Appleseed Project on Electoral Reform at American University Washington College of Law, together with its sister project at Harvard Law School, works to support electoral reform and democratic rights in American politics. It engages in advocacy and scholarship on a broad range of electoral reform issues. It is a non-partisan project, and was launched in 1999 by the Appleseed Foundation, a national non-profit public interest law organization. As part of its

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[1] Counsel for Respondent Central Virginia Educational Telecommunications Corporation and Counsel for Respondent Clear Channel Radio both have refused consent on the grounds that Professor Jamin B. Raskin, who co-authored this *amicus* brief, was listed as of counsel to the plaintiff in the district court. Professor Raskin signed no pleadings, entered no appearance and received no compensation for the pro bono constitutional advice he rendered to plantiff's counsel in the district court. He has had no direct role in the appeal of this case. A professor of constitutional law and the First Amendment, Professor Raskin has long championed the rights of new political parties including those part of the Coalition represented here. He has also authored a law review article on the subject of debate exclusion. Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 7 (June 1999). In 1997, on behalf of Perot '96, he filed an *amicus* brief with the Court in support of Respondent in the case of *Arkansas Educational Television Commission v. Forbes*.

work, the Appleseed Project at American University seeks to promote broad and robust candidate debates and to prevent the unfair manipulation of public opinion by government and the official suppression of new voices and new choices in American politics. The views expressed in this motion and following brief are solely those of the Project at American University, and may not reflect the positions of the Harvard Appleseed Project, or of any other Appleseed Center or Project.

The Coalition on Free and Open Elections is a national alliance of minor political parties combating the self-entrenchment of incumbent political parties through the passage of restrictive ballot rules, debate gerrymandering and other unlawful practices.

The Center for Voting and Democracy is a non-partisan and non-profit corporation incorporated in the District of Columbia for educational purposes. The Center researches and distributes information on electoral systems that promote full voter participation and fair representation, particularly alternatives that will enable more voters to elect candidates of their choice than in plurality or in traditional at-large elections. The Center's mission is founded on the belief that implementing such voting systems would: restore vitality to our democracy; ensure fairer representation of our society's diversity in elected bodies; and assist local, state, and national governments in solving the complex problems facing our nation.

The Appleseed Project, the Coalition and the Center are submitting a brief amici curiae in support of Petitioner, Sue Harris DeBauche. All have an interest in strong enforcement of the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* so as to protect the First Amendment and Equal Protection rights of American citizens challenging entrenched political establishments in their states.

In light of the important issues being raised in this case, the Appleseed Project, the Coalition and the Center respectfully request that their arguments be heard.

Respectfully submitted,

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February 14, 2000

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INTEREST OF THE *AMICI CURIAE*[1]

The Appleseed Project on Electoral Reform at American University Washington College of Law, together with its sister project at Harvard Law School, works to support electoral reform and democratic rights in American politics. It engages in advocacy and scholarship on a broad range of electoral reform issues. It is a non-partisan project, and was launched in 1999 by the Appleseed Foundation, a national non-profit public interest law organization. As part of its work, the Appleseed Project at American University seeks to promote broad and robust candidate debates and to prevent the unfair manipulation of public opinion by government and the official suppression of new voices and new choices in American politics. The views expressed in this brief are solely those of the Project at American University, and may not reflect the positions of the Harvard Appleseed Project, or of any other Appleseed Center or Project.

The Coalition on Free and Open Elections is a national coalition of minor political parties combating the self-entrenchment of incumbent political parties through the

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[1] Pursuant to Rule 37.6 of this Court, *amici* hereby represent that no person or entity, other than the named amici curiae, made any monetary contribution to the preparation and submission of this brief. One of the two attorneys who has prepared this *amicus* brief, Professor Jamin Raskin (who is Faculty Director of the Appleseed Project), acted in a *pro bono* of counsel capacity to the plaintiff in the district court. He has had no direct involvement in her case on the appellate level. A professor of constitutional law and the First Amendment, Professor Raskin has long championed the rights of new political parties. He has had also authored a law review article on the subject of debate exclusion. Jamin B. Raskin, *The Debate Gerrymander*, 77 Tex. L. Rev. 7 (June 1999). In 1997, on behalf of Perot '96, he filed an *amicus* brief with the Court in support of Respondent in the case of *Arkansas Educational Television Commission v. Forbes*.

passage of restrictive ballot rules, debate gerrymandering and other unlawful practices.

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The Appleseed Project, the Coalition and the Center all have an interest in strong enforcement of the Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* so as to protect the First Amendment and Equal Protection rights of American citizens challenging entrenched political establishments in their states.

SUMMARY OF ARGUMENT

With Independents the fastest-growing segment of the registered electorate, the judicial role in guaranteeing viewpoint-neutral and non-discriminatory access to government-run debates is critical to the success of outsider parties and indispensable to a meaningful choice for America's voters. The District Court's summary dismissal of Sue Harris DeBauche's challenge to the decision to exclude her from a government-run debate is a naked violation of the principles set out in *Arkansas Educational Television Commission v. Forbes* and a dangerous message to send to government debate sponsors in this election year.

ARGUMENT

I. AS AN INCREASING NUMBER OF GOVERNORS FROM OUTSIDE THE DEMOCRATIC AND REPUBLICAN PARTIES ARE ELECTED, THE JUDICIAL ROLE IN GUARANTEEING VIEWPOINT-NEUTRAL AND NON-DISCRIMINATORY ACCESS TO GOVERNMENT-SPONSORED DEBATES BECOMES CRITICAL NOT ONLY TO THE FORTUNES OF OUTSIDER CANDIDATES BUT TO THE FREE DEVELOPMENT OF AMERICAN DEMOCRACY.

In a constitutional sense, the United States has no "two-party system." [2] The Constitution does not mention political parties at all, much less bestow a title of nobility on any particular party.[3]

In a political sense, however, there are two large and dominant parties in the United States today. The Supreme Court decided in *Forbes* that those two parties could not exploit their control over the offices of governmental power to set up taxpayer-funded debates that deliberately exclude third-party candidates who may threaten the ideological and political interests of the two established parties.[4]

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[2] Of course, even if we were to legislate a "two-party system," it would be unconstitutional to legislate a Democratic-Republican party system. In this sense, the self-entrenchment of two particular parties is even more unlawful than the design of a system that would allow any two parties to come to power.

[3] The Constitution forbids the granting of Titles of Nobility. *See* U.S. Constit. Art. I, Section 9, Cl. 8.

[4] In the case of the Arkansas Educational Television Commission itself, the Court found that, based on extensive District Court factual findings, there had been no collusive political effort between the Democratic and Republican parties to gerrymander the debates. *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666, 683 (1998).

This principle could not be more timely or important for America's growing Independent and third-party movement. *See* R.W. Apple Jr., *The 2000 Campaign: The Swing Vote; Independents' Ballots Hold Promise for McCain and Bradley in Future Primaries*, N.Y. Times, Feb. 3, 2000 at A24 ("About 15 percent of national registration is independent, up from less than 1 percent 40 years ago, and that does not take into account the large number of states with no party registration."). During the last decade, the United States has witnessed the election of an Independent, Bernie Sanders, as Vermont's sole Representative to the U.S. House of Representatives and, even more significantly for this case, the election of four state Governors outside of the "two-party system" — Angus King of Maine, Lowell Weicker of Connecticut, Wally Hickel of Alaska and Jesse Ventura of Minnesota.[5]

These four popular governors may represent the groundswell of successful outsider candidates to come.[6] Independents represent the fastest-growing segment of the American electorate and have begun to make the critical

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[5] Angus King was elected to office in 1994 (Michael Barone and Grant Ujifusa, Almanac of American Politics 727 (2000)), Lowell Weicker served as Governor of Connecticut from 1990-1994 (Barone and Ujifusa, Almanac of American Politics 299-300 (1998), Walter Hickel served as Governor of Alaska from 1990 – 1994 (Id. at 78), and Jesse Ventura was elected to office in 1998 (Barone and Ujifusa, Almanac of American Politics 866 (2000).

[6] *See* A. Jay Higgins, *King Wants Second Term as Governor*, Portland Press Herald, Oct. 9, 1997 at 1A ("A statewide poll of 450 likely voters . . . gave King an 81 percent approval rating"); *Ventura's Approval Rating on Rebound*, The Bulletin's Frontrunner, Jan. 13, 2000 ("more than two-thirds of Minnesotans—68 percent—say they approve of Ventura's performance."); *Weicker's Ratings Rise To Highest Point For 1993*, The Hartford Courant, May 22, 1993 at B1 (citing a recent poll in which he received a seven point jump in approval ratings).

difference in elections across the country.[7] In the recent 2000 New Hampshire presidential primary, the nation took note of the fact that there were more Independents registered in New Hampshire than Democrats or Republicans, and numerous observers attributed Senator John McCain's stunning first-place finish there to his strength among Independent voters, who turned out in unexpectedly large numbers to endorse the anti-establishment message of Senator McCain.[8] Indeed, many voters instinctively grasp that "political figures outside the two major parties have been fertile sources for new ideas and new programs" and that "many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (citations omitted).

Governors King and Weicker participated in televised debates prior to their election.[9] But the example of

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[7] Twenty-seven states and the District of Columbia have electoral systems where voters register as members of a particular party. In 1996, of these, 46.7 percent were registered Democrats, 33.8 percent were registered Republicans, and 20.5 percent were registered Independents, miscellaneous, or other third-party members. Ballot Access News at 5 (Richard Winger ed., Dec. 12, 1996). It appears that the number of registered Independents is rising in the 2000 election cycle. *See* Editorial, *New Hampshire's Wisdom*, Boston Globe, Feb. 2, 2000 at A22 (reporting that independent voters outnumbered registered Republicans for the first time, with Democrats running third). *See also* Marjorie Connelly, *A Look at Voting Patterns of 115 Demographic Groups in House Races*, N.Y. Times, Nov. 9, 1998 at A20 (for the last three elections independents have comprised "a little more than one-fourth of all voters").

[8] *See* Apple, *The 2000 Campaign: The Swing Vote; Independents' Ballots Hold Promise for McCain and Bradley in Future Primaries*, N.Y. Times, Feb. 3, 2000 at A24 ("Independents had a major impact on both parties' pivotal primary elections in New Hampshire").

[9] *See* Kirk Johnson, *3 in Connecticut Focus on Taxes in a TV Debate*, N.Y. Times, Oct. 2, 1990 at 6 *available in* 1990 WL 2021788 (Lowell Weicker participated in 1990 debates); *Brennan Oks 7th Debate, May Take Part in Eighth*, Bangor Daily News, Sept. 14, 1994 *available in* 1994 WL 5524942 (Angus King participated in eight planned debates in 1994).

DeBauche's colleague in the Reform Party, Jesse Ventura of Minnesota, is particularly instructive for understanding the centrality of debates to the fortunes of outsider candidates. A bald giant ex-pro wrestler, he was derided by the state political establishment as a frivolous candidate with no chance of winning. Ventura nonetheless debated on an equal basis with his Democratic and Republican opponents. After ten televised debates, the voters of Minnesota decided that Ventura was the superior candidate and sent him to the Governor's mansion, despite the fact that he had never held statewide office before and was representing a political party considered to be on the fringe. *See Spending Limits Helped Ventura Win*, The Washington Post, Nov. 5, 1998 (in the debates, "Ventura clearly shined, appealing to blue-collar workers and young people with his candor, compassion and anti-establishment pronouncements that gradually chipped away at his opponents' poll numbers."). Richard H. Pildes, *The Theory of Political Competition*, The Law and Economics of Elections, Symposium Commentary, 85 Va. L. Rev. 1605, 1618 (stating that Minnesota election laws, including Ventura's participation in all ten debates, played a major role in his election as Governor); CBS News Transcripts: FACE THE NATION, Jan. 9, 2000, Burrelle's Information Services (Gov. Ventura stating, "the moment I debated I went from 10 percent up to 37 percent in six weeks and won the election").

No one knows whether Sue Harris DeBauche could have won her campaign for Governor of Virginia had she not been excluded from a televised government-sponsored debate between her two opponents. No one knows whether her exclusion altered the outcome of the race by driving down her political support to the benefit of one of her opponents. And no one knows whether she would have forced her opponents to address issues they both would have preferred to ignore.[10]

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[10] *See* Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992, at 23 (before Perot reentered the 1992 presidential campaign, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the]

Fortunately, we do not have to speculate about what might have been in this case since the *Forbes* case gives us a neutral due process principle to implement in cases of government-sponsored debate exclusion. And that principle has clearly been violated here.

II. THE DISTRICT COURT'S SUMMARY DISMISSAL OF SUE HARRIS DEBAUCHE'S CHALLENGE TO THE DECISION TO EXCLUDE HER FROM A GOVERNMENT-RUN DEBATE IS A NAKED VIOLATION OF THE PRINCIPLES SET OUT IN FORBES AND A DANGEROUS MESSAGE TO SEND TO GOVERNMENT DEBATE SPONSORS IN THIS ELECTION YEAR.

The Supreme Court's decision in *Forbes* stands for the proposition that government actors may not exclude political candidates from government-funded or sponsored debates on the basis of their political viewpoint or the political threat that they may pose to either of the invited candidates. Debates like the ones in Arkansas or Virginia are nonpublic fora but must, nonetheless, respect one critical constitutional principle. "To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Forbes* at 682 (citations omitted).

The question of whether state actors have excluded a candidate from a government-run debate on the basis of illegitimate political reasons is intensely fact-specific. Thus, in *Forbes*, the excluded candidate for Congress, Ralph Forbes, had the wide-open due process opportunity to conduct pre-trial discovery followed by a full jury trial on his claim that he was the victim of political viewpoint discrimination when he was excluded from the debate. A jury deliberated

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primal issues" of deficit reduction and generational equity, but Perot's candidacy made deficit reduction a central issue in the campaign).

and found that the decision to exclude him from the debates in Arkansas was based on reasonable grounds of journalistic discretion and not on "political pressure" based on Mr. Forbes' viewpoints. *Id.* at 683.

Justice Kennedy, in his meticulously detailed opinion for the *Forbes* majority, found that there was no viewpoint discrimination because the *trial jury* explicitly found that Forbes' exclusion from the debate was not based on "objections or opposition to his views." *Id.* (quoting the Appendix to the Petition for Certiorari 23a). Justice Kennedy further relied on the very specific courtroom testimony of the Executive Director of the Arkansas Educational Television Network, Susan Howarth. Justice Kennedy wrote of her testimony:

Forbes' views had "absolutely" no role in the decision to exclude him from the debate. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." . . . It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest. *Id.* at 682 (citations omitted) (brackets in original).

Sue Harris DeBauche received no trial and no discovery on her claim of political viewpoint discrimination as demanded by *Forbes*. She never had the opportunity to find out, much less to show the court, that her exclusion from the state-run debate was based on constitutionally impermissible criteria. The court was never able to make factual findings about why De Bauche was excluded. This is an especially egregious violation of the *Forbes* principle since the candidate

debate sponsor in Virginia had no formal criteria for selecting candidates and no formal process whatsoever to apply.

Unlike the Arkansas Educational Television Network, which had a professional staff and adopted the industry's Statement of Principles of Editorial Integrity in Public Broadcasting, the Virginia debate sponsors were flying by the seat of their pants. *Id.* at 669. When DeBauche became the balloted candidate of the Reform Party, she attempted to contact state employee and former Virginia Governor L. Douglas Wilder, the debate's coordinator, to seek a place in the debate. Wilder never responded to Sue Harris DeBauche's inquiries. She was unceremoniously shut out and never given any satisfactory explanation of why.

This outrageous process cannot stand under *Forbes*. If the District Court's cavalier—indeed hostile—treatment of DeBauche's First Amendment and Equal Protection rights is allowed to seep into the law, it will set a most dangerous precedent. Government debate sponsors all over the country will feel free simply to set up televised debates between favored candidates of incumbent parties and exclude outsiders. They will not even worry about working out formal and viewpoint-neutral criteria for debate participation, nor will they develop a fair process for applying such criteria. Like the debate sponsors in Virginia, they will act secretly, quickly, unaccountably and without any constitutional constraint to exclude outsider candidates. They will thus confer a major public subsidy—in both financial and symbolic terms—on the state-blessed insider candidates. They will know that the courts will simply wash their hands of such improper use of government power. So long Sue Harris DeBauche, so long Jesse Ventura.

CONCLUSION

For the above stated reasons, the Supreme Court should grant certiorari. It should make clear that district courts considering challenges to state actors excluding minor party candidates from debates must at least allow full discovery to

take place before dismissing these cases on summary judgment.

Respectfully submitted,

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February 14, 2000

Supreme Court, U.S.
FILED
FEB 22 2000

No. 99-1009

In The
SUPREME COURT OF THE UNITED STATES

SUE HARRIS DEBAUCHE,
Petitioner,

v.

EUGENE TRANI, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF AND APPENDIX

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February 18, 2000

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STATEMENT OF INTERVENING MATTER

Pursuant to Supreme Court Rule 15.8, petitioner Sue Harris DeBauche ("DeBauche") hereby submits this supplemental brief and attached appendix presenting intervening matter not available at the time of her last filing and further highlighting the importance of one of the questions presented in her Petition for a Writ of Certiorari (the "Petition"), namely, whether the Fourth Circuit erred in holding that prevailing party attorneys fees and costs may be awarded against Mrs. DeBauche's *pro bono* counsel or other non-parties under 42 U.S.C. §1988.

On February 1, 2000, the U. S. District Court for the Eastern District of Virginia "on remand from the Fourth Circuit" issued an Order setting a hearing on March 9, 2000, to reconsider "the award of attorneys fees and costs and the imposition of sanctions." *See* Supplemental Appendix ("SA") attached hereto, p. 1.[1] In response to that Order, respondents Clear Channel Radio, Inc., t/a WRVA and Central Virginia Educational Telecommunications, Inc., t/a/ WNVT, (the "Broadcaster Respondents") filed a joint Memorandum in Support of Attorney's Fees on Remand. SA 2. The issues raised in the Memorandum and the matters to be decided by the District Court directly relate to the second question presented in the Petition in this case as to whether the Fourth Circuit was correct as a matter of law in permitting an award of prevailing party attorney's fees under 42 U.S.C. §1988 to be apportioned between a civil rights plaintiff and her *pro bono* counsel and/or, in the words of the Broadcaster Respondents, the "driving

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[1] All citations to the Supplemental Appendix attached to this Supplemental Brief are cited herein as "SA" followed by the page number referencing the document cited.

force" behind the lawsuit. SA 8.[2]

In a joint Memorandum submitted to the District Court on February 14, 2000, the Broadcaster Respondents (who waived filing any submission to this Court on the Petition) specifically ask the District Court to "apportion the attorneys fee award under 42 U.S.C. §1988 to Clear Channel and CVETC such that Sue Harris DeBauche is personally and solely liable for 5% and her attorneys are liable, jointly and severally amongst themselves only, for 95% of the award." SA at 2-3. They justify their request based on the Fourth Circuit holding which, in their words, allows the District Court "to consider the financial resources of DeBauche and, if necessary, split responsibility for payment of the fee award between DeBauche and her attorneys," citing the panel majority's opinion at 191 F.3d at 511. SA 6. Noting that DeBauche has filed her Petition for a Writ of Certiorari in this case, they continue: "Unless and until that petition and appeal are resolved, this Court is bound by the Fourth Circuit's determination that the Section 1988 award may be taxed to DeBauche's attorneys." Id.[3]

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[2] The Fourth Circuit panel majority indicated the District Court could consider "[Ms. DeBauche's] resources or her backing for this lawsuit" in awarding costs under 42 U.S.C. §1988. Appendix to Petition at 22.

[3] Having never made a timely motion for Rule 11 sanctions, the Broadcaster Respondents now urge the Court to award sanctions against the *pro bono* attorneys under its "inherent powers," notwithstanding the fact that an "inherent powers" motion was previously made and adjudicated by the District Court. That motion resulted in an award of sanctions *only* under 28 U.S.C. §1927, a ruling that was reversed by the Fourth Circuit. A separate motion for sanctions filed in the Fourth Circuit and the Broadcaster Respondents'

The Broadcaster Respondents also urge upon the District Court the novel notion that "[a] fee award may be assessed against a non-party who is the "driving force" behind the litigation," relying upon *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System*, 548 F. Supp. 157 (N.D. Ga. 1982) SA 8. This argument is remarkably similar to the question presented in *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), *cert. granted*, ____ U. S. ____ (U.S. November 29, 1999) (No. 99-502), where prevailing party fees were assessed against a non-party. In the present case, the Broadcaster Respondents contend that "the substantial resources martialled by an allegedly impecunious plaintiff suggest that The Rutherford Institute and the Reform Party were the "driving force" behind plaintiff's suit." SA 8. Respondent L. Douglas Wilder also asks the District Court to conduct an evidentiary hearing "to determine the financial resources available to plaintiff, either through her personal resources of [sic] those backing this lawsuit . . .", pointing out that the record does not contain "factual information on the ability of plaintiff's counsel, or those affiliated with her counsel to pay the fees that have been incurred as a result of this meritless lawsuit." Brief in Support of Claim for §1988 Attorneys Fees, (pp.4-5) filed by Wilder in the District Court on remand.[4]

Bills of Cost were also denied and no appeal was made of any of these rulings.

[4] At the same time, Wilder has represented to this Court that he does not have a "position *in this Court* as to whether the fees should be awarded jointly and severally against Petitioner and her <u>*pro bono*</u> counsel." Brief in Opposition, p. 15 (emphasis added).

SUMMARY OF ARGUMENT

The attempt by these respondents in newly initiated proceedings in the District Court to seek apportionment of prevailing party attorneys fees under 42 U.S.C. §1988 between Mrs. DeBauche, her counsel and/or other "non-parties" highlights the significance and importance of the conflict between the Circuits on this issue and suggests that the issue of awarding prevailing party attorneys fees against counsel or other non-parties should be considered by this Court in connection with this Court's consideration of the same issue in *Donald E. Nelson v. Adams USA, Inc., et al.*, 175 F.3d 1343 (Fed. Cir. 1999), *cert. granted*, ____ U. S. ____ (U.S. November 29, 1999) (No. 99-502).

ARGUMENT

THE PROCEEDINGS INITIATED BY RESPONDENTS ON REMAND IN THE DISTRICT COURT TO OBTAIN PREVAILING PARTY ATTORNEYS FEES FROM MRS. DEBAUCHE, HER *PRO BONO* COUNSEL AND/OR OTHER "NON-PARTIES" HIGHLIGHT THE IMPORTANCE OF THE CONFLICT OF LAW BETWEEN THE CIRCUITS, AND THE SIGNIFICANCE OF THE QUESTION, AS TO WHETHER §1988 PREVAILING PARTY ATTORNEYS FEES MAY BE AWARDED OR APPORTIONED AGAINST NON-PARTIES

The attempt to apportion prevailing party attorneys fees under 42 U.S.C. §1988 among Mrs. DeBauche, her counsel or other non-parties, based on the Fourth Circuit holding in this case, highlights the importance of the issues presented in the

Petition. This apportionment directly conflicts with the contrary holding of the Third Circuit in *Brown v. Town of Chambersburg*, 903 F.2d 274, 276-77 (3rd Cir. 1990). Moreover, it raises an important unresolved question of Federal law, as confirmed by this Court's grant of certiorari in the *Nelson* case on November 29, 1999, namely whether "prevailing party" attorneys fees may be assessed against a non-party under 35 U.S.C. §285.

The Fourth Circuit's sanction of an inquiry into Mrs. DeBauche's "backing for the lawsuit," and the subsequent action to allocate §1988 fees against The Rutherford Institute, its *pro bono* attorneys and/or The Reform Party also presents serious issues under the Petition, Speech and Association Clauses of the First Amendment for political parties, for advocacy organizations that support the prosecution of civil rights claims and for their affiliated counsel. *See NAACP v. Button*, 371 U.S. 415, 428-29 (1983), *In Re Primus*, 436 U.S. 412, 423 (1978), and their progeny.[5] The suggestion that an evidentiary hearing be conducted into the "resources available" to Ms. DeBauche --- at the behest of a billion dollar media conglomerate (Clear Channel) and a purportedly private party for state action purposes (Wilder) whose fees are being paid for by the Commonwealth of Virginia --- threatens to turn the traditional hospitality of the Federal courts to First Amendment claims on its head.[6] It is almost Kafkaesque that the present posture of

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[5] Ms. DeBauche's counsel are cooperating attorneys for The Rutherford Institute which provided <u>*pro*</u> <u>*bono*</u> counsel who represented Mr. Forbes before the U. S. Supreme Court in *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998).

[6] The billing statements attached to Wilder's Verified Bill of Costs were not directed to him, but to "Commonwealth of Virginia, Division

this case involves the attempted punishment of the Reform Party and others when, in the face of a *bona fide Forbes* challenge to the alleged viewpoint-motivated exclusion of a duly balloted Reform Party candidate from a government-run debate, the lower courts have not even required the respondents to give any reasons whatsoever for the exclusion of Mrs. DeBauche or provided her with the opportunity to prove that the exclusion was unreasonable and viewpoint-discriminatory. If the Fourth Circuit decision is upheld, the legal remedy provided by the *Forbes* ruling will not only be eviscerated, it will be transformed into a sword to bludgeon disfavored political parties and minority candidates.

Finally, this case threatens Mrs. DeBauche's *pro bono* counsel and the other "non-parties" with irreparable due process deprivation. If this Court denies certiorari, there will be no plenary appellate review of the decision to permit apportionment of attorneys fees against non-parties under §1988 since the Fourth Circuit's *ipse dixit* ruling was made in passing without any briefing or argument of any kind and, unless reversed, becomes final in this Court (except for the mathematics of the apportionment of fees between the party and the non-parties). As a matter of justice, this Court should not countenance such a result.

CONCLUSION

For the reasons set forth in Mrs. DeBauche's Petition and this Supplemental Brief, the Petition for Certiorari should be granted and the case, reversed and remanded, as suggested in the Petition, or otherwise it should be accorded plenary

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of Risk Management, Property/Liability Unit, P. O. Box 1140, Richmond, Virginia 23208-1121, Attention: Sue Keener, Deputy Director."

consideration by this Court.

DATED: February 17, 2000.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX TO PETITIONER'S SUPPLEMENTAL BRIEF AND APPENDIX ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SUE HARRIS DEBAUCHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.:
	)	3:97cv770
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

The above-captioned matter, on remand from the Fourth Circuit to reconsider the award of attorneys fees and costs and the imposition of sanctions, is set for oral argument in this Court on March 9, 2000, at 11:00 a.m. Defendants are hereby ORDERED to file their briefs by closed of business, February 22, 2000. Defendants will not file replies.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

FEB 1 2000
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SUE HARRIS DEBAUCHE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.:
	)	3:97cv770
VIRGINIA COMMONWEALTH UNIVERSITY, et al.,	)	
	)	
	)	
Defendants.	)	

CLEAR CHANNEL'S AND CVETC'S MEMORANDUM IN SUPPORT OF ATTORNEY'S FEES UPON REMAND

Clear Channel Radio, Inc., t/a WRVA ("Clear Channel") and Central Virginia Educational Telecommunications, Inc., t/a WNVT ("CVETC") state the following in support of their claims for attorney's fees and costs upon remand to this Court by the United States Court of Appeals for the Fourth Circuit in *DeBauche v. Trani, et al*, 191 F.3d 499 (4th Cir. 1999):

ISSUES ON REMAND

Clear Channel and CVETC respectfully request relief upon remand as follows:

1. The Court should apportion the attorney's fee award under 42 U.S.C. §1988 to Clear Channel and CVETC such that Sue Harris DeBauche is personally and solely liable for 5%, and her attorneys are liable, jointly and severally amongst

themselves only, for 95% of the award.

2. The Court should sanction DeBauche's attorneys jointly and severally under its inherent power by awarding Clear Channel and CVETC their attorney's fees and costs.

3. The Court should award Clear Channel and CVETC additional fees and costs associated with this matter in an amount to be determined at the hearing set for March 9 in this matter.

PROCEDURAL HISTORY

By Memorandum Opinion dated April 13, 1998, the Court dismissed the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and awarded defendants L. Douglas Wilder, Clear Channel, and CVETC their attorney's fees pursuant to 42 U.S.C. §1988. *DeBauche v. VCU, et al.*, 7 F. Supp.2d 718 (E.D. Va. 1998). The Court determined that "DeBauche's claims against CVETC and Clear Channel were without foundation, as the two were not even alleged to have played a role in the decision to exclude her from the debate." Mem. Op. at 13.

The Court issued its Final Order and Memorandum Opinion on September 4, 1998. Pursuant to 42 U.S.C. §1988, the Court awarded Clear Channel $13,922.80 and CVETC $23,935.70. The Court also ruled that the judgment in favor of CVETC and Clear Channel would be joint and several against DeBauche's "counsel of record" under 28 U.S.C. §1927. In doing so, the Court held that "it was evident that DeBauche was tying the private broadcasting defendants with a tenuous string to Virginia Commonwealth University to show they were exhibiting state action," and that "DeBauche's attorneys chose to overlook the one essential element of their multi-private defendant lawsuit, that is, there must be state action in the first

place." Mem. Op. at 19. The Court also held that DeBauche's case was "an unreasonable and intentional pursuit of a frivolous position which warrants an award under Section 1927 particularly in light of DeBauche's financial situation and the Court's question as to how her lawsuit has been funded." *Id.*

DeBauche and her attorneys appealed on the merits and regarding the fee award. The Fourth Circuit affirmed the dismissal of the Complaint. After a thorough review of the allegations and the law, the Fourth Circuit held that DeBauche failed to state a claim under 42 U.S.C. §1983 because it was "quite clear that the actions attributable to Wilder, WRVA, and WNVT amounted to their independently-motivated, private actions, rather than 'state action.'" 191 F.3d at 509.

Regarding the fee award, the Fourth Circuit affirmed the fee award under Section 1988 on the grounds that the "amended complaint that DeBauche filed makes it clear that the choice not to include DeBauche in Debate Virginia was made by Wilder, not by VCU, and it was not the product of any coercion by the state. Indeed, the invitations to the Republican and Democratic candidates were extended before VCU was even involved." *Id.* at 510. In response to DeBauche's argument that a fee award would chill future lawsuits by injured persons, the Court noted that "in the circumstances of this case, it can just as easily be argued that *groundless lawsuits like DeBauche's* might chill broadcasters' and other journalists' exercise of their First Amendment rights in organizing political debates." *Id.* (emphasis added).

The Fourth Circuit however, remanded the Section 1988 fee award to allow the Court to apportion the award between DeBauche and her attorneys based upon a consideration of DeBauche's financial condition.

> While we find no abuse of discretion in the decision to order DeBauche to pay fees and

> costs, we do believe that DeBauche's contention that her financial circumstances should be taken into account has merit...If the Court intended to split responsibility for paying fees and costs between DeBauche and her attorneys, it may do so on remand.

Id. at 511.

The Fourth Circuit reversed the award under Section 1927. Finally, the Fourth Circuit held that this Court could award fees under Rule 11:

> [The reversal of the fee award under Section 1927] is not to say, however, that the district court lacks authority to impose sanctions for the filing of a frivolous complaint. Federal Rule of Civil Procedure 11 allows sanctions against attorneys and parties who file pleadings that contain "claim [or] other legal contentions [that] are [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," or factual allegations that have neither evidentiary support nor the likelihood of forthcoming evidentiary support.
>
> Accordingly, we also vacate the sanctions imposed under § 1927 and remand to permit the district court to consider sanctions under Rule 11. Whether to impose Rule 11 sanctions, however, is committed to the discretion of the district court.

Id. at 512.[1]

ARGUMENT

I. The Court should apportion the Section 1988 fee award by holding DeBauche liable for 5% and her attorney's jointly and severally liable for 95% of the fee amount.

The Fourth Circuit affirmed this Court's award of attorney's fees and costs under Section 1988 but remanded the issue to allow this Court to consider the financial resources of DeBauche and , if necessary, split responsibility for payment of the fee award between DeBauche and their attorneys. 191 F.3d at 511. Clear Channel and CVETC urge the Court to require Debauche's attorneys to pay for the vast majority, or 95% of the fees.

By now it is clearly apparent that this lawsuit is not simply an outgrowth of DeBauche's desire to be Governor of Virginia. Instead, it is a well-orchestrated and well-funded attempt by the Reform Party, the Rutherford Institute and others to fulfill their political agenda regardless of the costs to private actors such as Clear Channel and CVETC. DeBauche's claims of poverty not only ring hollow, they are deliberately

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1 DeBauche has filed a Petition for Writ of Certiorari with the United States Supreme Court in which she seeks, among other things, a reversal of the Section 1988 fee award against DeBauche's attorneys on the grounds that Section 1988 allows for fee awards against parties only and not their attorneys. Unless and until that petition and appeal are resolved, this Court is bound by the Fourth circuit's determination that the Section 1988 award may be taxed to DeBauche's attorneys.

misleading when one considers the substantial legal team assembled on her behalf, and now on behalf of her attorneys:

> James J. Knicely of Knicely and Cotorceanu, P.C.;
>
> Thomas S. Neuberger, a legal specialist from Delaware;
>
> Jamin Raskin, a Professor at American University, Washington School of Law;
>
> John W. Whitehead of the Rutherford Institute in Charlottesville, Virginia, and his associate, Stephen H. Aden;[2]
>
> William Bradford Reynolds of Collier, Shannon, Rill & Scott, PLLC;[3] and
>
> Craig L. Parshall, a Fredericksburg, Virginia attorney.[4]

In light of DeBauche's claims of poverty, it is obvious that this lawsuit could be maintained only by a substantial infusion of

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2 The Rutherford Institute is perhaps best known for its representation of Paula Jones in her lawsuit against President Clinton.

3 Mr. Reynolds is the Reagan Administration's former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

4 DeBauche also submitted an affidavit authored by Gary Leedes, a Professor of Law at T.C. Williams School of Law at the University of Richmond, Virginia.

money and intellect from the parties other than Ms. DeBauche.[5]

Moreover, whatever the nature of the support provided to DeBauche by her team of attorneys, it is clear that those attorneys have ample ability to pay 95% of the award. The financial statements of the Rutherford Institute, for example, demonstrate that as of June 30, 1998, shortly after this Court entered its fee award, the Rutherford Institute had over $2.7 million in net assets. (The financial statements will be provided to the Court before the hearing on March 9). The Rutherford Institute paid Whitehead and Aden total compensation of almost $279,000 during that year. In addition, her attorneys had the financial wherewithal to post a bond in the amount of $65,000 to cover any fee award in this case. It is clear that DeBauche's attorneys can well afford to pay 95% of the award.

This is not to say that DeBauche should be let off the hook entirely.[6] Even parties with few financial resources can be

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5 A fee award may be assessed against a non-party who is the "driving force" behind the litigation. In *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System*, 548 F.Supp. 157 (N.D.Ga. 1982), an individual set up a trust, which then created an "instrumentality," Bounty Hunters, which served as the "nominal plaintiff" in a *qui tam* suit under the Federal False Claims Act, 31 U.S.C. § 231, *et seq*. The suit was similar to several other suits which had been brought by the individual, and the court held that "[t]here is no question but that [the individual] is the driving force behind this lawsuit, as he has been in his...individual lawsuits involving identical issues and claims, and that therefore attorney's fees can be assessed against him." *Id.* At 162. In this case, the substantial resources martialled by an allegedly impecunious plaintiff suggest that the Rutherford Institute and the Reform Party were the "driving force" behind plaintiff's suit.

6 Clear Channel will serve a subpoena on DeBauche's attorneys for certain billing statements to determine what DeBauche has paid in

liable for attorney's fee awards under Section 1988. See *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234 (5th Cir. 1990) (the financial condition of a non-prevailing plaintiff charged with attorney's fees under § 1988 is but one factor, and not the controlling factor, that a court should consider).

> The dual interests of equity and deterrence can be advanced without giving overriding consideration to the punitive value of a fee award, particularly when the reduced award still represents a substantial burden on the plaintiff and the defendant is fully capable of absorbing a reasonable share of its legal fees without hardship. When the plaintiff can afford to pay, however, the congressional goal of discouraging frivolous suits weighs heavily in favor of levying the full fees.

Arnold v. Burger King Corp., 719 F.2d 63, 68 (4th cir. 1983).

DeBauche alleged that she is "a business consultant and owner and operator of several small businesses." Complaint ¶5. She submitted an Affidavit to the Court stating that her income for 1995-97 was $43,000. Thus, she clearly has the financial ability to pay a portion of the fee award. Moreover, DeBauche voluntarily injected herself into the rough and tumble world of electoral politics. She represented to the voters of Virginia that she was capable of serving as the Commonwealth's chief executive, ran for governor on behalf of a large and well-funded political party, and voluntarily sought out conflict. No one compelled DeBauche to run for office or file lawsuits. Her conduct has caused CVETC and Clear Channel to lose real money, and she should be held accountable for her actions.

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this litigation. The documents received may be presented at the hearing scheduled for March 9, 2000.

Therefore, Clear Channel and CVETC suggest that the Court require DeBauche to pay 5% of the fee award.

II. This Court Should Use its Inherent Powers to Sanction Plaintiff's Counsel.

In order to ensure that DeBauche's attorneys are held responsible for this frivolous litigation, this Court should also sanction DeBauche and her attorneys under its inherent powers. As the Fourth Circuit has held, "[i]t is clear from the legal standards through which these sanctions [Rule 11, inherent power and 28 U.S.C. § 1927] operate that there can in many cases be significant overlap among them. In a proper case, several of the theories can be invoked to justify punishment of the same conduct." *Blue v. Dept. of Army*, 525, 914 F.2d 534 (4th Cir. 1990).[7]

Thus, this Court "possesses its own inherent power to sanction a litigant in addition to or instead of the sanctioning provisions of Rule 11." *Howell v. Nesbit*, 1998 U.S. App. LEXIS 12735 at *9 (4th cir. 1998) (unpublished).

> "[T]here are ample grounds for recognizing...that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," even though the so-called "American Rule" prohibits fee shifting in most cases. As we

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7 In her brief to the Fourth Circuit, DeBauche recognized that she may be subject to sanction under this Court's inherent power or Federal Rule of Civil Procedure 11. *See* DeBauche Br. at 11 (citing *In re Keegan Management Securities Litigation*, 78 F.3d 431, 435 (9th Cir. 1996) for the proposition that "[t]he filing of a complaint may be sanctioned pursuant to Rule 11 or a court's inherent power").

> explained in Alyeska, these exceptions fall into three categories...Third, and most relevant here, a court may assess attorney's fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."...The imposition of sanctions in this instance transcends a court's equitable power concerning the relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of "vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy."

Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (*citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 259 (1975), other citations omitted).

The so-called "bad faith" category of inherent sanctions is not restricted to cases where an action is *filed* in bad faith, but also where it is *conducted* in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Hall v. Cole*, 412 U.S. 1, 15 (1973). While a court may clearly tax counsel fees against a party who has litigated in bad faith, "it certainly may assess those expenses against *counsel* who willfully abuse judicial processes." *Roadway Express*, 447 U.S. at 766 (citation omitted) (emphasis added).

This Court held initially that plaintiff's counsel should be sanctioned for violating 28 U.S.C. § 1927, which proscribes an attorney from multiplying the proceedings in a case "unreasonably and vexatiously." On appeal, the Fourth Circuit did not dispute that DeBauche's attorney's acted unreasonably and vexatiously; indeed they urged the Court on remand to consider imposing Rule 11 sanctions against them "for the filing

of a frivolous complaint." 191 F.3d at 512. Instead, the Fourth Circuit disagreed that they multiplied the proceedings by filing a single complaint. *Id.*

Thus, the Fourth Circuit has, at least implicitly, acknowledged that plaintiff's counsel acted unreasonably and vexatiously in filing this lawsuit. It also explicitly held that their client's claim was "groundless and without foundation." 191 F.3d at 512. Either is sufficient to support an award of fees under the Court's inherent power.

Furthermore, the Fourth Circuit urged the imposition of Rule 11 sanctions against DeBauche's counsel. 191 F.3d at 512. As the Supreme Court held in *Chambers*, the bad faith standard resembles Rule 11's certification requirement. *Chambers*, 501 U.S. at 46 n.10. Thus, if DeBauche's attorneys violated Rule 11, they also were guilty of conduct that merits the imposition of the inherent disciplinary powers of this Court. Indeed, "Rule 11 'does not repeal or modify existing authority of federal courts to deal with abuses...under the court's inherent power.'" *Id.* at 48-49.

Reliance on inherent power as a sanction does not necessarily represent an "end run" around the notice requirements of Rule 11, especially when opposing counsel and the court have warned repeatedly that the conduct being sanctioned was at best questionable. *Chambers*, 501 U.S. at 45. In this litigation, counsel for defendants warned plaintiff's counsel repeatedly in pleadings, by letter and during telephone conversations that this action was unfounded and frivolous. The Court made similar statements during hearings and in its rulings. The fact that plaintiff's counsel "refused to be deterred" does not vitiate the Court's ability to impose sanctions based on its inherent powers. *Id.*

Accordingly, defendants urge the Court to impose, pursuant to its inherent powers, an award of their attorney's fees against DeBauche's attorneys.

Although the Fourth Circuit invited the Court to impose sanctions under Rule 11, such sanctions cannot benefit defendants. Defendants did not file a formal Rule 11 motion and thus, despite putting DeBauche on clear and unequivocal notice that her claim was frivolous and sanctionable, cannot be awarded fees and costs as a sanction under Rule 11. If this Court were to monetarily sanction DeBauche on its own initiative under Rule 11(c)(I)(B) as the Fourth Circuit suggests, the money would be paid into Court, not to defendants. *See Howell v. Nesbit*, 1998 U.S. App. LEXIS 12735 (4th Cir.1988) (unpublished)("Under [Rule 11(c)(1)(B)], sanctions may not be awarded to the Defendants").

In this case, however, the proper purpose of sanctions should be to compensate defendants for incurring hours of attorney's fees in response to frivolous, bad faith litigation prosecuted by no less than seven attorneys on behalf of an admittedly impecunious plaintiff. Thus, in order for a sanctions award to inure to the benefit of Clear Channel and CVETC, the Court should alternatively sanction DeBauche and her attorneys under its inherent power and award the benefit of such sanctions to Clear Channel and CVETC.

III. Clear Channel and CVETC are entitled to recover additional fees and costs.

Despite the frivolousness of this case, the award of fees to defendants, and DeBauche's claim of poverty, DeBauche and her attorney's have continued to vigorously litigate this matter on all fronts. As a result, Clear Channel and CVETC continue to spend money. As the Fourth Circuit has held, "it is well settled that the time spent defending entitlement to attorney's fees is properly compensable under § 1988." *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995). *See also Ganey v. Garrison*, 813 F.2d 650, 652 (4th Cir. 1987); *Daly v. Hill*, 790

F.2d 1071, 1080 (4th cir. 1986).

Thus, Clear Channel and CVETC are entitled to recover all fees spent preparing and defending their fee application, including the cost on remand. They will provide supporting materials for such fees to DeBauche by February 21, and will present their up-to-date time and expense records at the hearing.

CONCLUSION

For all these reasons, Clear Channel and CVETC respectfully request that the Court award costs and attorney's fees to Clear Channel and CVETC as set forth herein.

Respectfully submitted,
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t/a WRVA

By _____/s/_____
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CERTIFICATE OF SERVICE

This is to certify that on this 14th day of February, 2000 a true copy of the foregoing document was mailed first class to:

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